PREFACE

We realize that this brief will seem unnecessarily long.

Until the receipt of the opinion in this case the doctrine of the exercise of the police power of the state, as here applied, had never been known by counsel to be involved herein.

It was not discussed, nor urged before the Appellate Court.

The decision being now based *entirely* upon the supposed exercise of the police power by the Legislature, in the enactment of Subdivision 2 of Section 70 of the Code, makes necessary a consideration here of the doctrine of the police power, and of the California cases cited by the court thereon, and of the Peabody case, decided January 31st, 1935.

While we are perhaps justified in assuming that the opinion would not have been based upon the doctrine of the police power, if the court had not determined that petitioner's rights were vested, and could not be taken by a retrospective act, yet, not knowing the position which will now be taken by respondents, it seems necessary to here discuss these subjects.

There follows a classified subject index.

It classifies, by number, the subjects discussed, and designates the Brief pages where stated, and the pages where they are discussed.

The classified index is, therefore, a ready reference

to each point, and to the authorities supporting the same. Our table of Cases, Statutes, Constitutional provisions and Text Books cited, gives page reference to the citations.

We hope that the Court will carefully examine the classified subject index, before concluding that the length of the brief will increase the Court's burdens.

And with the thought that it will be of valuable assistance, we respectfully submit it in the following pages:

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SUBJECT CLASSIFICATION

Under this we classify the numbered points or paragraphs in the Brief, and upon the respective subjects, and at the chapters and Brief pages shown below.

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Hence, when the power company purchased the lands they had no riparian rights accompanying them.

Therefore, the decision that the legislature had by definition defined a vested riparian right, to be only such as had been used before the enactment, (its 181), and the decision (at its 182), that the power company had by such definition lost its right to the continu-

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ous flow of the stream, was mere dictum, for the power company never acquired any riparian rights, and, therefore, had none to which the decision could apply.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

NO. 612

THE CALIFORNIA OREGON POWER COMPANY, a Corporation,

Petitioner,

vs.

BEAVER PORTLAND CEMENT COMPANY, a Corporation, and CITY OF GOLD HILL, OREGON, a Municipal Corporation,

Respondents.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF

To the Honorable, the Supreme Court of the United States:

JURISDICTIONAL AND OTHER REFERENCES

CHAPTER I.

(b) This suit was instituted in the District Court for Oregon, and final decree entered therein, March 11, 1932, (R. 78-9). The Bill of Complaint alleged diversity of citizenship as the sole ground for federal jurisdiction. The opinion has not been reported. (It is at R. 50-66).

The cause was appealed to the United States Circuit

Court of Appeals for the Ninth Circuit. The opinion is reported at 73 F. (2d) 555.

(c) The grounds on which the jurisdiction of this court is invoked are as follows:

The original jurisdiction having been obtained solely upon the ground of diversity of citizenship, and the Court of Appeals having taken jurisdiction of the cause solely upon that ground, (although Federal constitutional questions had been raised after the cause was begun), and said judgment and decree of the Court of Appeals being final, and not appealable, the same was, and is reviewable at the discretion of this Court, upon Certiorari. The jurisdiction of the Appellate Court having been based upon the ground of diverse citizenship, and it having had the entire record before it, and having considered the case upon its merits, and having disposed of the entire matter by final decree, the cause may be fully considered and disposed of here.

1. The date of the judgment to be reviewed is November 5, 1934, (R. 479). It affirmed the judgment and decree of the District Court, found at R. 78-9.

2. The specific claims advanced and rulings made in the lower court which are relied upon as a basis for this Court's jurisdiction are:

Petitioner's Bill of Complaint was filed in the District Court July 26, 1930 (R. 16), and alleged diversity of citizenship of the parties as the sole basis for federal jurisdiction. The Bill alleged petitioner's riparian rights in its said lands described therein; that these

lands border on Rogue River in the district, and extend under the waters of the river to the thread thereof. That respondents' lands lie across the river therefrom, and upon the opposite bank thereof. They extend under the waters of said river to the thread thereof, (admitted in the pleadings); that just prior to the filing of the suit respondent Cement Company had exploded large quantities of dynamite in the bed of said river on its side of the stream near the thread. That the resulting explosions had shattered the rock bed of the river for a distance of 100 feet up and down said stream, with an approximate width of 27 feet, and for a depth of six feet below the low water mark of said river, and the rubble resulting from such explosions lies in the bed of said stream. That it was the purpose of the respondent Cement Company to remove the same, and they were engaged in so removing it when enjoined, and, except for the injunction, would have removed the same. (Alleged in the Complaint, paragraph XII, R. 24-5, and admitted in the Answer, paragraph XVIII, R. 37-38). The testimony showed the length of the channel so to be opened was 200 feet up and down said stream, by 30 feet wide, to a depth of six feet below the water level (Appx. 99-100, quoting R. 116); that the amount of water in addition to that naturally flowing there, and so to be drawn in the said new channel, was 1347 second-feet, according to the Cement Company's official in charge of the blasting operations, (Appx. 124-5, quoting R. 112 and 114.) This is

more than twice the flow of the stream at low water.

The Cement Company intended that when its contemplated plan was carried out, it would leave on petitioner's land 122 cubic feet per second of water, which Cement Company said it was required to leave for a fishway, (Appx. 150-1, quoting R. 114). Such water so to be drawn through said new channel was to flow through the connecting canal, to Cement Company's contemplated power plant, and there dropped through turbines, (Appx. 139-140, quoting R. 111; Appx. 140-2, quoting R. 188-191; Appx. 143, quoting R. 199). Inasmuch as a way for fish is required to be made around such plant, the water remaining upon petitioner's land must then be so used for such fishway.

Petitioner contends that the result of the decree of the Appellate Court is to dissolve the existing injunction, permit the removal of the rock shattered by the explosions, creating a depression in said stream bed into which said waters of the stream would be naturally drawn from petitioner's lands, to its permanent injury.

Respondents' answer alleged the existence of uncompleted State Engineer's permits, as its rights for such dynamiting of said river bed, and the removal therefrom of the rock shattered by the said explosions (Answer XI, R. 33-4; XVIII, 37-8). Said permits were issued under the Oregon 1909 Water Code, set forth in full at Appendix 1-33.

In 1924 the Oregon Court in Re Water Rights of Hood River (cited) determined that Subdivision 2 of

Section 70 of said Water Code (Appx. 29-30), destroyed all vested riparian rights in such streams which had not, prior to the enactment of the Code, been put to a beneficial use. And the Appellate Court adopted that construction of Subdivision 2 of said Section 70, holding in effect that petitioner's said common law rights in said stream and channel thereof, were destroyed by the terms of said Water Code (R. 448, 450, 73 Fed. (2d) 568-9). Petitioner contends that said Subdivision 2 of said Section 70 is not unconstitutional when properly construed. But as construed here, as to petitioner's rights, it is violative of Section 1 of the 14th Amendment to the Federal Constitution, and the state thereby deprived the petitioner of its property without due process of law, and denied to it the "equal protection of the law." That it is contrary to the decision of this court in

Pacific Livestock Company vs. Lewis,
(1915). (Cited here, page 134),

so construing said Act, and with reference to said Subdivision 2 of said Section 70.

That it violates Section 4 of Article XI of the Oregon Constitution, forbidding the taking by any corporation of one's property without compensation, as said section was construed by the Oregon court in

Logan vs. Spaulding Lumber Company,
(February, 1921), (cited),

holding that the law permitting the impairment of such riparian right is violative thereof. That decision is con-

trolling and should have been followed below.

The Appellate Court in its opinion held that its said construction of said Subdivision 2 of Section 70 of the Water Code was within the power of the state in the exercise of its police power, on the ground that such construction regulated the use of the waters of said stream, and did not amount to a taking of the property; whereas, petitioner contends the result of the decree is to take petitioner's water rights without due process of law, or compensation, and to transfer the same to the respondents, which likewise violates said Section 1 of the 14th Amendment, in both of the particulars above specified.

Petitioner contends that the Appellate Court should have decided that the Desert Land Act of March 3rd, 1877, did not reserve to the United States riparian rights in the lands on non-navigable streams patented after the date of said Act, as construed by the Oregon court in *Hough vs. Porter,* (decided 1909), while holding that the doctrine of that case was unsound. Said question should have been definitely determined, and petitioner has the right to have such a federal statute, where material, passed upon by a federal court.

Petitioner maintains that the Appellate Court should have reversed said decree of said District Court, and required a decree to be entered therein, in accordance with the prayer of the petitioner's Bill, and making said injunction perpetual.

The acts complained of were enjoined in the District

Court July 26, 1930, (R. 17-18). The Decree of the District Court dissolved said injunction, (R. 78); denied petitioner any relief, and gave judgment against petitioner for costs (R. 79). It did enjoin respondents from drawing the water down below a certain level, which would leave, as respondents claim, about 122 second-feet, necessary for its fishway on petitioner's lands. (Appx. 151). Said quantity of water is worthless for power purposes for which alone petitioner's lands are valuable.

The injunction was contined during appeal to the Court of Appeals (R. 91). The decree of the Appellate Court affirmed the District Court, and dissolved the injunction against the blasting, removal of blasted rock, etc. (R. 479-480).

The mandate of the Appellate Court was by order thereof stayed pending action here on petition for Writ. (R. 480).

3. The statutory provisions under which such jurisdiction is invoked are:

Section 240, Judicial Code, (28 U. S. C. A., Section 347), providing the cases in which Certiorari to said Circuit Court of Appeals will be allowed. And Section 128 of the Judicial Code, amended, (Title 28, U.S.C.A., Section 225), providing for the review of final decisions by Circuit Courts of Appeal.

4. Petitioner cites the following cases believed to sustain the jurisdiction.

Mecanno vs. Wanamaker,
253 U. S. 136-142,
64 Law Ed. 822.

Petitioner refers to the portion of the opinion by Mr. Justice McReynolds at 253 U. S. 140.

Harriman vs. Northern Securities Company,
197 U. S. 244-299,
49 Law Ed. 739,

a decision by Mr. Chief Justice Fuller. We refer particularly to page 287 of 197 U. S., where it is held that the entire controversy may be disposed of on the merits here, the record having presented the whole case to the Court of Appeals in such manner that it might properly have been disposed of there, and the judgment is final.

Denver vs. New York Trust Company,
229 U. S. (S. C. Reporter's Edition) 123-145, at 133,
57 Law Ed. 1101,

a decision by Mr. Justice Van Devanter, construing Sections 240 and 128 of the Judicial Code to the effect that Certiorari lies to review the decree of the Appellate Court, where under Section 128 no appeal would lie, because this is a case in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship. Hence, the jurisdiction of the Appellate Court likewise depended upon diverse citizenship precluding an appeal.

Friend vs. Talcott,
228 U. S. 27, at 36.
57 Law Ed. 718,
(as to the application of the police power—not urged below).

STATEMENT OF THE CASE.

CHAPTER II:

This cause is here on Certiorari to the Circuit Court of Appeals for the Ninth Circuit, to which it had been appealed from the District Court at Portland, Oregon.

The suit was instituted to prevent confiscation of petitioner's common law riparian rights in its lands bordering on Rogue River in southern Oregon.

The petitioner is a public utility, with powers of eminent domain, resident in California, and engaged in the distribution of electric power in northern California and southern Oregon.

The respondent City is a municipality of Oregon, with a population of about 600.

The respondent Cement Company is an Oregon private corporation, engaged in the manufacture of cement at respondent City.

It is the party in interest here, having acquired the city's rights by appropriation in Rogue River, (and certain permits issued by the State Engineer of Oregon)—by a contract of purchase under which about half the purchase price has been paid. The contract is Exhibit "A" to respondents' Answer. (Answer at R. 20-38. Exhibit A thereto R. 38-46). As will be shown, this situation makes the Cement Company the owner of the property and leaves the City the holder of the legal title, as security for the balance of the purchase price.

CHAPTER II

Petitioner's lands are riparian to Rogue River, lie along the east bank thereof, and extend under the water to the thread of the stream, where their western boundary becomes the eastern boundary of the riparian lands of respondents.

Respondents' lands, therefore, lie along the west bank of the stream, extend under the river to the thread, and are opposite the lands of the petitioner. The stream flows south at this point. (Paragraph V, of the Bill of Complaint, (R. 7-8) sets forth provisions of the decree of December 20th, 1929, between the same parties over the same lands. Said paragraph V of the Bill of Complaint is admitted by the Answer of respondents, Paragraph VI (R. 23). Respondents' Answer, paragraph X (R. 10), alleges that petitioner's said lands, and respondents' lands lie along said stream, as stated above.

> By an Act of Congress of May 18th, 1796, still in force, it is provided that,
>
> "In all cases where the opposite banks of any stream, not navigable, belong to different persons, the stream and the bed thereof shall be common to both."
>
> (Citation and discussion of the Act embodied in the Brief, at pages 269-70).

Petitioner maintains that said statute, being in effect when the lands of the respective parties were patented, vested such rights in said lands. Particularly so, because on its admission, the state adopted the doctrine of common law riparian rights, and administered the

same in all cases until the issuance of petitioner's patent, and for many years thereafter. And especially since the Oregon Court, during all of said period, consistently protected by injunction, the beds and banks of non-navigable streams, to preserve inviolate the common law riparian water rights of the proprietors of lands bordering thereon.

Ever since March 11th, 1921, petitioner has been and is the owner of its said lands. (Bill of Complaint, paragraph IV, R. 7). Admitted in respondents' Answer, Paragraph VI, (R. 23). Petitioner acquired its said lands, in order to construct and operate thereon, by the use of its riparian rights, a stand-by power plant for the manufacture of electrical energy. (R. 201-202) (Appx. 145). The necessity for such stand-by plants, and their uses, is explained in the testimony set forth in the Appendix, pages 143-145.

Briefly it may be said from the record:

That petitioner operates large hydro-electric power plants in the adjacent canyons and mountainous country, from which plants high voltage power lines are brought to the place of distribution of the power, and near petitioner's lands. These lines, passing through the mountain fastness, are liable to damage from storms and other causes, and the power transmitted thereby is liable to interruption. Therefore, the necessity for such stand-by plants does not arise until the use of power has justified the construction of these plants, and their long transmission lines. This comes after the utility

furnishing the power has assisted in the settlement and in the development of industry in the territory served, when it becomes necessary to distribute larger quantities of power to consumers. Hence, stand-by plants, properly stationed, as this would be, are necessary to the continuous service which the utility is required to maintain.

During the times herein mentioned, the Cement Company has been a substantial user of power furnished by the petitioner. And at the times with which we are concerned, it was seeking to construct its own plant for the manufacture of electrical power, on its lands opposite the lands of the petitioner, and to transmit said power to its cement mill, which adjoins the corporate limits of respondent City. (This is shown in respondents' Answer,—and the purpose of its operations complained of herein are explained by the Cement Company and set forth in the record, Appx. 149).

Prior to the sale of the City's property to the Cement Company (Exhibit "A" to the Answer) (R. 38-45), petitioner and the Cement Company were contenders for the purchase of the City's riparian lands and water rights. Petitioner offered $40,000.00, and the Cement Company $22,500.00 (R. 166). Petitioner offered to immediately begin the construction of its stand-by plant, which would have cost about $750,000.00 (R. 187). The City, upon a vote, accepted the Cement Company's offer, and declined that of petitioner. (R. 167).

Two suits prior to this one followed the sale of the

City's property to the Cement Company. The first was a suit in the name of the City, instituted and conducted by the Cement Company, to condemn nine acres of petitioner's said Lot 1, for the purpose of enabling the Cement Company to place thereon the eastern end of its proposed dam for the diversion of the waters of the stream to the respondent's west side thereof, for *power* purposes. It was begun October 20, 1926, and went to final judgment in *petitioner's* favor June 13, 1928.

Notwithstanding the result of said condemnation action, and the verdict of the jury for petitioner, the Cement Company began to build a cement structure on the same portion of petitioner's said land, for the same purposes.

The petitioner enjoined said work in the Federal District Court at Portland, Cause E-8991, in which suit the respondents were defendants. That case was decided by the Court of Appeals in 1929. (Reported at 35 F. (2d) 317). (In that court it was Number 5806). It began September 13th, 1928, three months after the determination of the condemnation suit. The decree of December 20, 1929, permanently enjoined this work. The respondents had based their claim upon an abandoned easement, growing out of a former suit.

The stipulation of the parties here, reciting the dates of the beginning and determination of said suits, is Plaintiff's (Petitioner's) Exhibit 30 (R. 356-7).

July 26, 1930, petitioner instituted this suit. (R. 356, 357). It was brought to prevent further dynamiting

of the river bed and further removal of the rock shattered by the excavation, and to prevent the changing of the current of the stream, and withdrawing the water from petitioner's said property; likewise to establish the ownership and riparian character of petitioner's lands.

The former case had gone to decree, as stated, December 20th, 1929. (R. 172). In the opinion in that case the Court of Appeals had said that whatever may be the rule in Oregon touching riparian rights, the pleadings were inadequate and the time premature for a sweeping adjudication in respect to the relative rights of the parties. (35 Fed. (2d) 319). These respondents in that case had pled the ownership of the same rights by appropriation as they set forth in this case. Petitioner interpreted the portion of the opinion referred to, as intended to give to these respondents an opportunity to plead their riparian rights. For, so far as petitioner's rights were concerned, they were alleged to be the riparian rights belonging to its said land. The Oregon court had held, in a case cited here, that the allegation that the land bordered upon the meandered non-navigable stream, was sufficient to define its common law riparian rights.

It had been shown to the court of Appeals that a litigant could not claim in the same water suit, rights both by appropriation and by riparian proprietorship from the same stream. Hence, as we believed—the suggestion

that the pleadings were not ample for a full adjudication of the rights of the respective parties.

Apparently the Cement Company was unwilling to accept this opportunity, for it took no steps to settle or determined the controversy. It seemed to Petitioner that the Cement Company became impatient and attempted to substitute dynamite, for decrees. At any rate the dynamiting of the river bed occurred at about seven months following the entry of the modified decree in that case. The respondents were by said decree enjoined from further construction of its diversion works upon petitioner's said land. As we shall presently show, with record references, it intended by the dynamiting to cause the lowered channel to suck the water from petitioner's land into its power canal which it was deepening and widening, to make it carry more than twice the amount of water that flows in the river at low water in the ordinary season.

THE DYNAMITING

Mr. W. H. Muirhead, Vice President, and in charge of the Cement Company's operations, was responsible for the dynamiting. He testified that preparatory to the dynamiting, the Cement Company drilled holes in the bed of the river and inserted sticks or plugs therein (Appx. 120); that the drilling operations preparatory to the explosion of the dynamite were begun October 16th, 1928, and completed November 20th, 1928; that the drilling was completed about ten days *before*

the decision in said former case, then pending in the Court of Appeals. He said he was personally in charge of the dynamiting operations (R. 324-5, here, Appx. 122). He produced what petitioner's introduced as Plaintiff's Exhibit 4, a photo. (R. 119, Appx. 119).

PLAINTIFF'S EXHIBIT NO. 4

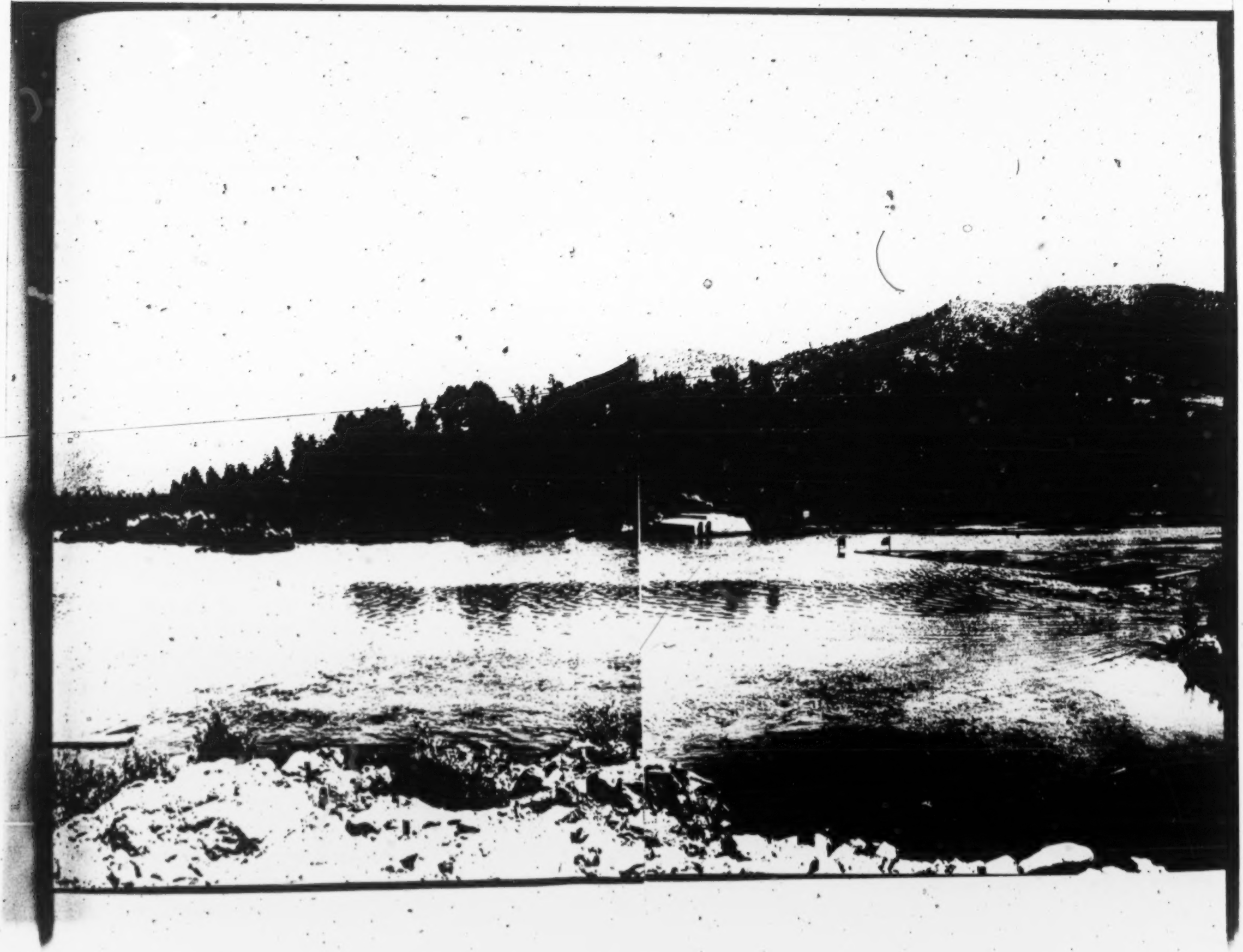
SHOWING AREA BEFORE BLASTING

Will the Court please turn to Plaintiff's Exhibit 4.

Mr. Muirhead testified that this Exhibit 4 was taken a couple of days before the blasting occurred; that it showed 220 holes from which wooden pegs protruded, these being the holes drilled to receive the dynamite. He pointed out on the exhibit the pegs showing the location of the holes (R. 118, here Appx. 119-120). It will be noted that arrows are shown pointing to some of these pegs, and that the pegs show that the drill holes are not only along the west border of the river, but are really well into the center of the stream, although all are on the west side of the thread thereof. In the distance to the left is seen a white cement pier, the further building of which was enjoined in said former decree of December 20th, 1929 (R. 172). This pier is on petitioner's land at the point sought to be condemned in the eminent domain suit mentioned.

RESULT OF THE BLASTING

At this point petitioner inserts Plaintiff's Exhibit 5, a print from a picture taken by the Cement Company three days after the explosion of the dynamite, to show the same area then, as was shown by Exhibit 4 (R. 122).



PLAINTIFF'S EXHIBIT NO. 5

AREA AFTER BLASTING

Mr. Muirhead testified that the two exhibits represented the condition before and after the blasting; that the dates on which the pictures were taken were: Exhibit 4, July 13th, 1930; Exhibit 5, July 24, 1930; and that the explosion occurred on July 21st, 1930. (R. 125, here Appx. 121).

If the Court will turn to Plaintiff's Exhibit 5, and compare it with Plaintiff's Exhibit 4, it will find that it is apparent that the blasting operations were successful, and highly so. The pile of rubble shown in the right half of Exhibit 5 has more the appearance of a wreck resulting from volcanic action, than from the work of man. At a glance the Court can see the results that would follow the removel of the rock shattered by the explosions from the 220 dynamite charges.

The Act of May 18th, 1796.

This was, of course, in conformity with the riparian doctrine that already existed. It was a part of an Act providing the system to be followed in the survey of the Northwest Territory.

It is true that in Oregon, as in most all of the states of the Union, riparian proprietors own to the thread of the non-navigable streams on which their lands border. So that the east boundary of the one tract, becomes the west boundary of the tract on the opposite side of the stream running south. Courts have said that this ownership is only for convenience and to avoid controversies. This is so, irrespective of the fact that the stream and

the bed thereof *are common* to both. Petitioner maintains that such a river bed is the way for the stream, and its use is common to the riparian proprietors whose lands are opposite. This federal statute is still in full force and effect. It has been cited by this Court, as we will show in the body of the brief.

Petitioner will contend and show that up to the time of the issuance of petitioner's patent in 1885, and for years afterwards, the Oregon Court has by injunction protected the beds and banks of the non-navigable streams at the application of the riparian owner. This is so because the common law riparian doctrine, which came to Oregon upon its admission to state-hood, and was adhered to up to the time of the passage of the Oregon Water Code (Appx. 1 to 33 inclusive), and afterwards, entitled the riparian proprietor to have the stream flow over and along his land at its usual height and in its natural channel, subject only to such changes as may be made by the reasonable riparian use of other riparian proprietors on the stream. This preservation of the stream and channel in its natural state is the outstanding element in a riparian right to the use of the waters of the stream. This right is part and parcel of the land, and can only be taken away by adverse use and possession, under a claim of right for the period of prescription—ten years, or by grant.

In its answer and at the trial the Cement Company attempted to justify the blasting of the river bed in order to apply the water for which it held State

Engineer's permits, numbered and set forth in its answer at paragraph XI, R. 33, paragraph XVIII, R. 37. It was admitted at the trial that the City's adjudicated rights, its own 220 second-feet, a part of which it used in its municipal plant, plus the McClure 75 second-feet (Appx. 147-148, quoting record), and quoting Boyle (undisputed) Appx. 147, R. 196-7), if transferred to the east side of the river, would all flow naturally into the City's plant, (the Cement Company's proposed plant site), without the dynamiting or the excavation of the rock shattered thereby; that the river in a state of nature naturally flows more than that quantity of water into the said power site, (295 second-feet).

The State Engineer's permits are the permits provided for in the Oregon 1909 Water Code. They are not the water right "certificates" provided for in Section 53 of the Water Code (Appx. 22). They are mere options to appropriate, or, as other courts have called them, "declarations of intention to appropriate" water from the stream. They were, as required by the Act, issued "subject to existing rights" (Water Code Section 1, Appx. 1). The permits were, therefore, subject to whatever of the petitioner's vested riparian rights were left after the enactment of the Water Code. We maintain they were not impaired by the Act. The Appellate Court, following the Hood River case, declared in effect that they do no longer exist.

The Water Code never purported to give the appro-

priator the right to enter upon the land of another to make an appropriation of water therefrom, and it has been so decided in the Oregon courts. Although the Water Code, Section 72, (Appx. 32) does give the right of *eminent domain* to acquire for public use any property or rights necessary for the application of water to a beneficial use, etc.

Petitioner urges that no State Engineer could have, under any statute, authority to issue permits justifying the acts complained of in this suit.

In the discussion that follows, we will make reference to several cases, the citations of which are:

In Re Willow Creek, 74 Or. 593;
144 Pac. 505; 146 Pac. 475; (Brief page 131).

Pacific Live Stock Co. v. Lewis,
241 U. S. 440; 60 L. ed. 1084; (Brief page 134).

Re Water Rights of Hood River,
114 Or. 112; 227 Pac. 1065; (Brief page 136).

In 1915, following the adoption of the Water Code, the Oregon court decided "In Re Willow Creek," cited and discussed below. This was the first of the adjudications considered in this court, in the case of *Pacific Livestock vs. Lewis.* In that case the constitutionality of the Act in some of its main features was assailed. Among the questions raised was whether or not the Act destroyed vested rights in violation of the "Due Process of Law" clause of the 14th Amendment. This court gave careful consideration to the opinion In Re

Willow Creek, and to the Act, read in the light of the Willow Creek decision.

Through the opinion in the Willow Creek case, the Oregon court announced: that the doctrine of prior appropriation and riparian rights is not so antagonistic that they may not both exist in the same locality; that every riparian proprietor is entitled, as against other riparian proprietors, to a reasonable use of the water of a non-navigable stream flowing through his land; that when riparian rights have become vested, they *cannot be taken away by legislative* enactment *nor judicial decree;* that the Water Code of 1909 called into requisition its police power only to a *limited extent;* that like all property, riparian rights are subject to *reasonable regulation.* It quoted previous Oregon decisions to the effect that the general doctrine of riparian rights was *too firmly established in the state* to now be shaken by judicial decision.

It quoted the Appellate Court, that the general doctrine of riparian rights was too firmly established in the state to be shaken now by judicial decision; that it was useless to cite authorities; that the riparian proprietor was entitled to the flow of the stream as long as it was of any beneficial use to him, *even to the flood waters,* etc. This, and other assurances, were put before this Court in *Pacific Livestock vs. Lewis,* a decision rendered in the October Term, 1915, closely following the Willow Creek decision.

And this Court gave due consideration thereto, and to the plain language of the Water Code in its Section 1, (that subject to existing rights, all of the waters of the state might be appropriated, etc; that nothing therein contained should be so construed as to take away the vested right of any person, etc.), and to Subdivision 1, of Section 70 thereof (Appx. 29), "that nothing in this Act contained shall impair the vested right of any person, association or corporation to the use of water," and held that the statute was not intended to take away or impair any vested right to any water or to its use, stating that this was expressly declared in its *first and its 70th Sections.*

In February, 1921 the Oregon Court held unconstitutional, as violating Section 4 of Article XI of the Oregon Constitution (cited), an Oregon statute which impaired a riparian right on a non-navigable stream, saying that it was a taking of property in proportion to the impairment of the riparian right. Petitioner acquired its lands after that decision; they had been patented in 1885.

There was the assurance in 1915 from the Willow Creek case that such rights were protected, and the decision of this Court, based upon the Willow Creek case, and upon the plain language of the statute itself, holding that the statute was not intended to impair any vested right to any water, or to its uses.

The Water Code had been in operation six years when these assurances were given. Nine years there-

after the Oregon court decided the Hood River case, and held that the Legislature had the right, (Subdivision 2 of Section 70), to destroy riparian rights, by *definition* of a vested right; that those vested riparian rights which had not been used prior to the enactment of the Code were destroyed. The construction, of course, is erroneous, because Subdivision 2 of Section 70 *does not declare* that those vested rights *which had not been put to a beneficial use,* at the enactment, were destroyed, but only that actual application of water to a beneficial use prior to the passage of the Act *shall be deemed to create* in such riparian proprietor a vested right.

Subdivision 8 of Section 70 declares:

> "All rights *granted* or *declared* by this Act shall be adjudicated and determined in the manner and by the tribunals as provided by this Act."

So that a proper construction of Section 70 seems to be that the Legislature intended to "create" in the riparian proprietor, who had used his right, a vested right, meaning thereby to convert it into an appropriation, as Subdivisions 3 shows, but to give it priority over other riparian rights.

And now, in the instant case, we have the decision of the Appellate Court, following the Hood River case, accepting the declaration that the common law riparian doctrine would "take the heart out of the Water Code," and make it difficult of administration.

And following the construction of In Re Hood River it holds that petitioner's vested rights were destroyed by the exercise of the police power of the state. And although petitioner's property has an undisputed value of $30,000.00 for power purposes,—the decision holds that petitioner is without damage.

Fishway.

The District Court enjoined the drawing down of the water of the river at the point in controversy below a certain surface water elevation. The testimony by the Cement Company was to the effect that this would leave on petitioner's property about 122 second-feet. The contour of the river bed being uneven, the amount could not, of course, be definitely ascertained.

The Vice President of the company, and in charge of its operations, held that this would leave sufficient water on petitioner's land for a "fishway." That this was all right, with the Cement Company, because he understood that the law required it to leave water for a fishway, (Appx. 151), (hence he was using petitioner's land therefor). Unfortunately, the Oregon law makes it a criminal offense to take *fish* from a fishway.

So that it appears that the excavation of the rock in the blasted area, in connection with the widening and the deepening of the canal, would permanently and totally destroy petitioner's land for any useful purpose whatever.

Cement Company Would Sell Power.

The Cement Company seeks to take this water from petitioner, for its own electrical plant. At times when the cement mill should not require all the power its plant would make,—it would sell power (Appx. 148-9). It purchases its power now from petitioner, the utility supplying the territory. It would compete with petitioner in a business not its own, *and which its charter does not permit,* it being a private corporation.

Mr. Justice Wilbur, presiding Judge, in the dissenting opinion here, expressed the view that such a construction of the Hood River case as is applied in the prevailing opinion, would result in the *taking* of petitioner's valuable property and turning it over to another without compensation, and that this could not be done without violating the Federal Constitution. He held that it amounted to a *taking* rather than a *regulation* of the riparian use.

We contend that as construed, the Water Code makes no pretense at the regulation of riparian rights. Its regulation is entirely of the use of the waters acquired through appropriation. By the terms of the Act, it seems not to have been even the intention of the Legislature to adjudicate riparian rights that had not been used at the enactment, (Subdivision 8 of Section 70).

Petitioner recognizes that the Cement Company, as a riparian proprietor, would have a right to make a reasonable use of the waters of the stream equal with

the right of the petitioner. But the Cement Company will have none of this. In the condemnation suit, the first of the series, it sought to condemn petitioner's property through the use of the city's name. In the second suit it sought to build a part of its dam thereon, under the pretense of using an abandoned easement. It refused to heed the suggestion of the Appellate Court that the pleadings were not adequate for the determination of the riparian rights between the parties. But instead of acting thereon, dynamited the river in an effort to take all of the water *without any authority whatever*, except the paper permits of a State Engineer, which had no property value or standing whatever. Certainly a court will not uphold the right to do this.

The Cement Company insists upon using upon its side of the stream not only the 220 second-feet admitted to belong to the City, but also the McClure 75 second-feet which the adjudication decree requires to be returned to the river on petitioner's side of the river, and *above* petitioner's land. It also insists upon so using, to the full extent thereof, the 1347 second-feet of water represented by the permits of the State Engineer. If it should be allowed to do this it follows that petitioner's riparian rights to the use of any of the waters of the stream will be destroyed.

With all due deference to the majority opinion, we are constrained to state that the Hood River case is

not in point in this case. The contest in that case, to which was applied the rule followed in the Appellate Court, arose between the claims of an upper appropriator of water for irrigation, and the power company's claim of riparian rights below. The opinion recites that the power company obtained its land from the State of Oregon; that when the state conveyed the lands to the power company's predecessors the law prevailing in Oregon authorized an appropriator, subject to existing rights at the time of his appropriation, to take the waters of the streams of the state for beneficial use, and convey them to non-riparian lands. (Paragraphs 26, 27; 114 Or. 181). The lands mentioned came to the state in 1859 on its admission to the Union. In the Act of Congress admitting the state there was the proposition to grant to the state Sections 16 and 36 of every township, and, if they had been acquired, other lands in lieu thereof, for the use of schools; 72 sections for State University, 10 entire sections for the purpose of completing public buildings, etc. These lands came to the state as they were and by grant. Of course, the state, as the proprietor of the land could denude it of riparian rights, if it had riparian rights, just as cases in this court (cited herein) held that the United States may while it is the proprietor of land define the terms of its grant. But if there is nothing to indicate otherwise, the entire property without reservation is conveyed.

The opinion at 183 states that it did not appear to

have been the intention of the power company earlier than the year 1883 to use any more water than it had diverted at that time.

The power company was in contest with upper appropriators, particularly Mt. Hood Water Company. (Opinion 150 and findings at 151). The Mt. Hood Water Company claimed under Mt. Hood Supply Company with priority of 1895 (Opinion 153).

So apparently according to these references the power company was claiming both as a riparian proprietor and as an appropriator. Apparently the power company's appropriation of 1883, showing no intention to use more water than diverted, left the field open under the doctrine of appropriation, to appropriate the surplus water remaining over the power company's appropriation. Apparently both were claiming as appropriators. True, the power company also claimed as a riparian proprietor. But it could not claim both ways in the same adjudication proceedings. The claims have been repeatedly held by the Oregon court to be inconsistent.

The Hood River case seems not only *not* in point, but to hardly bear a resemblance to the present controversy.

And it is said in the Hood River opinion that the power company recognized the rule that those obtaining title to the land take the same subject to the laws then prevailing. Of course, if the decision is put upon the ground that the state was the proprietor, and could

if it choose to do so, allow adverse appropriation to take the water from its lands, the opinion would seem "plausible," but not in point.

How different from this case. The owners of these riparian rights of the respective parties did not appropriate the water, they acquired the land; the lands being riparian to the stream carried with them as part and parcel thereof the riparian water rights. In this case the proprietor was the United States. It patented these lands to the patentee without any reservations whatever. And as this Court said in

Scott v. Lattig, (pages 270-1 hereof),

the court did not hesitate to say that Congress

> "intended to provide that the common law rules of riparian ownership should apply to lands bordering on non-navigable streams."

And it is said in

Kansas vs. Colorado, (pages 42-3 hereof),

the state on its admission could determine whether it would have the riparian right doctrine or the doctrine of appropriation applicable to the use of its waters. And as the state on its admission adopted the common law, and consistently applied to the lands patented thereafter the riparian doctrine, it seems the right in such lands was plainly a vested right. As to these no landed proprietor divested them of the riparian right. Is there any parallel at all between the two cases upon this point?

Strange to say in the Hood River case the court

decided that the power company was not entitled to an adjudication, as a riparian proprietor, that it had no riparian right whatever because it had not exercised its right prior to the enactment of the Code, (Op. page 182). If the state had denuded these lands of the riparian rights while it owned them, what is meant by the statement that it had not used these rights before the enactment of the Code? So we maintain that the Appellate Court is not justified in applying the doctrine of the Hood River case.

While the Hood River case was being thus decided, the same court had under consideration

Norwood vs. Eastern Oregon Land Company (1924) (here pages 130, 137),

commonly called the "Norwood case." In that case, which the majority opinion stated was decided at the same time as the Hood River case, the Oregon court held:

> "The title of the defendant, therefore, carried with it the common law riparian rights which have always been recognized in this state."

As the lands in question were patented prior to the passage of the Desert Land Act, the writer of the opinion in the Norwood case dodged the opinion in the Hood River case, holding that the lands did have riparian rights under the doctrine of *Hough vs. Porter*. But with the power company, whose rights came from the United States in 1859, on the admission of the state, it was different. It was not allowed an adjudica-

tion. So to have any consistency in the opinions at all, the Hood River opinion must have been put upon the ground of the state having been the proprietor, and this upper appropriation having grown up adversely, under the policy and doctrine of the state permitting such appropriations.

While in this case the petitioner is standing upon its vested riparian right, the respondent City has two small rights acquired under the doctrine of appropriation. These, petitioner has not disputed. One, the McClure right, was appropriated before petitioner's lands were patented, and the adjudication decree requires the water returned to the stream at a place above petitioner's land. It was a power right, operating a small quartz mill, so there was no loss by use.

As to the 220 second-feet of the City, the petitioner cheerfully concedes the right. It is more than sufficient for the City's municipal purposes. The water flows naturally into the little City power plant, which is to be the site of the Cement Company's plant. Petitioner has no contest with the City over that right.

But here we have no upper adverse appropriations in contest. In fact, we have no prior appropriations in contest. The depredations which the Cement Company committed in the river bed were to take the water from petitioner's lands under permits which are not property, which have no standing as property, but are mere licenses which may never be completed. Divergencies between the Hood River and the instant case be-

come wider and wider as we compare them. It has ever been the riparian doctrine that a riparian right is not gained by use, nor lost by misuse.

THE POLICE POWER

Petitioner freely admits that property of all classes must bow to the superior authority of the state for public good. But that does not mean that property can be confiscated for public good. It means only that the state may regulate its use if that be necessary, or if the state must have it, it may condemn it and pay for it.

As was aptly stated in the dissenting opinion:

> "If then these two adjoining owners are entitled to the entire flow of the stream as it actually reaches their land for the purpose of generating power thereon, can the state legislature take the right of one owner to a part of this power and confer it upon the other in the exercise of the police power of the state? The proposition thus stated carries its own answer, for it has always been held that a state cannot in the alleged exercise of its police power take the property of one person and confer it upon another. As stated by the Supreme Court of North Carolina in *Lowe vs. Harris,* 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379:
>
> 'No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in any state of the union', citing *Cooley Const. Lim.* 165; *Wilkinson v. Leland,* 27 U. S. (2 Pet.) 658, 7 L. Ed. 553;" (R. 467) (Here follows a long citation of authorities).

In the dissenting opinion Mr. Justice Wilbur offer-

ed a solution of great merit, and one worthy of consideration.

We quote from the dissenting opinion, 73 F. (2d) 576-7 (R. 477-8):

> "It follows that a full recognition of the common law riparian right to full and continuous flow would destroy the right. Here is a legitimate field for the exercise of the police power of the state to give to the owner desiring to utilize his power the right to make the necessary changes on his land to do so. On the other hand, the rights of the appellant should be fully protected. This can be accomplished, I think, by granting an injunction unless the appellees shall file a disclaimer to more than one-half of the flow of the stream, after the deduction of the flow of 220 second feet to which it has an acknowledged priority, and an agreement to pay a reasonable sum for the use of all water above one-half of the remaining flow of the stream after deduction of 220 second-feet, said amount to be fixed by the court, and payable monthly for such power so used for the previous month, the appellees to have the right to use the full flow of 1,347 second-feet if the water level of 1,070 feet permits until such time as the appellant is ready to utilize its one-half of the flow of the stream, less 220 feet."

A decree to be worked out upon this line should restrain destruction of the river bed. Nature divided the water practically equally, by the reefs, some of which would have been destroyed except for the injunction. It would cost a considerable sum to restore the bed, following the excavation of the shattered material. And, the shattered area being on the cement company's side of

the thread, would make complications in any effort to restore the bed.

The decree should restrain the use of permits for the taking of petitioner's portion of the water. Respondents have ample protection in the riparian right.

SPECIFICATION OF ERRORS

Petitioner specifies the following errors in the decision of the Appellate Court, and upon which it relies:

1. The decision violates Section 4 of Article XI of the Oregon Constitution, as construed by the Oregon Supreme Court, June 15th, 1920, which decision should have been followed.

2. The decision violates the "Due Process of Law" clause of the 14th Amendment to the Federal Constitution, in the taking of private property without due process of law.

3. It violates the "Equal Protection of the Laws" clause of the 14th Amendment in this:

It *especially preserves* rights of riparian owners who had used their rights for beneficial purposes before the enactment of the Water Code of 1909, *but denies this same privilege to all who* had *not* so used theirs, and in which class petitioner is.

4. The Appellate Court erred in not construing the Federal Act of March 3rd, 1877, known as the "Desert Land Act," because the Oregon Court had construed it as destroying riparian rights in lands patented after

its enactment. Petitioner is entitled to have that question passed upon by the Federal Court.

5. The Appellate Court erred in not reversing the judgment of the District Court, and decreeing an injunction protecting the channel of Rogue River from further blasting or removal of rock already blasted therein.

6. And in failing to decree that petitioner's riparian rights were unaffected by the Desert Land Act, or by Chapter 216 of the laws of 1909.

7. It erred in holding that *Section* 70 of the Oregon Water Code of 1909 was an exercise of the police power, *regulating* petitioners' riparian rights, whereas, as construed it took and confiscated the same. The Court erred in not construing said *Section* 70 of the Water Code in accordance with the decision of this Court, *directly construing the same as not impairing vested rights.*

SUMMARY PRECEDING ARGUMENT

CHAPTER III.

In support of petitioner's Specification of Errors 1, 2, 3, 5, 6, and 7, the petitioner makes the following points:

(1) That at the time of the issuance of petitioner's patent to its lands, the common law riparian doctrine prevailed in Oregon, and that such patent carried with it such riparian rights to Rogue River. That such rights relate back to the date of settlement and entry of said lands. That these rights abide in the land, and belong to the owner thereof, until he is deprived of the same by grant, adverse use, or some other legal means. That after the date of such entry no appropriation of the waters of said stream can be made which will invade such riparian rights.

In support thereof, we submit the following:

ON ADMISSION, STATE MAY ADOPT OR REJECT COMMON LAW RIPARIAN DOCTRINE

When a state is admitted into the Union, it may determine for itself whether or not it will adopt the common-law doctrine of riparian rights.

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

We quote from 206 U. S. at 94-5, as follows:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the *arid regions of the West* of the appropriation of waters for the *purposes of irrigation shall control.* Congress cannot enforce either rule upon any state."

(A further quotation from this case on this point is at Appx. 45).

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON

Speaking of the common law in Oregon, Mr. Justice Gray in

Shively v. Bowlby, 152 U. S. 1, 52 (38 L. Ed. 331, 350), 152 U. S. at 52,

said:

"The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law."

The foregoing decision was rendered in this court at the October term, 1893. In error, to the Supreme Court of Oregon, to review the judgment of that court, affirming a judgment of the Circuit Court of Clatsop County, Oregon, in equity, brought by Bowlby against Shively, to quiet the title to lands below high-water mark in the City of Astoria. The judgment dismissed

the claim of the defendants under a patent from the United States to the title to the lands, and then on motion of the plaintiff, dismissed the suit, without prejudice. The case below is reported in 22 Oregon at page 410. It was affirmed here.

See also:

United States F. & G. Co. v. Bramwell, 108 Or., pages 261-289. *July* 10, 1923 (217 Pac. 332).

Quotation from pages 264-266:

"The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or in conflict with the Constitution and laws of the United States or of this State, except as modified, changed or repealed by our own statutes, has been adopted and is in force in this state: *Perry v. Fletcher,* 93 Or. 43 (182 Pac. 143).

By Section 2, Article 1 of the Organic Law of the provisional government of Oregon, adopted by the vote of the people on July 26, 1845, it was declared that:

> 'The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law.' * * * * *

"Section 7, Article XVIII of the Constitution, adopted by the people on September 18, 1857, provides that 'All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed*'."

In

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. *January* 19, 1926, (242 Pac. 823),

Quotation from page 5:

> *"It is our understanding that we are as much bound by the applicable rules of the common law, where such rules have not been modified, or abrogated by statute, as we are by the statutes themselves."*

OREGON CASES DECIDED PRIOR TO THE ISSUANCE OF PETITIONER'S PATENT

These cases early decided that the common law riparian doctrine was applicable to the conditions prevailing in Oregon, and applied the same, thereby supplementing and applying the constitutional provisions quoted.

We cite:

James Taylor v. James Welch, 6th Or. 199, (decided at the December term, 1876-7, pages 200-201.

This was an equity suit for an injunction and damages. The plaintiff alleged the ownership of the land upon which he resided, and that a spring branch creek had, from time immemorial, flowed through the same and furnished his water supply; that the stream was made by a spring pond or swale above plaintiff's land and on the lands of the defendants; that the defendants had dug, and were continuing to open an artificial channel from said pond or swale, so as to divert the

water from plaintiff's premises, and to convert the same to their own use, to plaintiff's injury. These allegations were put in issue.

The court held that the plaintiff had not satisfactorily established the facts as to the prior existence of a well defined stream, etc. However, the court stated the rules of law applicable. It said, in substance, that the rules of law are well settled; that every proprietor of land through which flows a stream of water, has a right to the use of the water flowing in its natural channel, without diminution or obstruction, citing Washburn on easements, 215, but that the rule does not apply to percolating water. (Further quotation from the opinion, Appx. 48).

Shively et al v. Hume et al, 10 Or. 76 (1881) applied the doctrine of *Taylor v: Welch,* to the effect that the proprietor of the land through which a stream of water flowed

> "has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and that this was equally true of water which flows in a well defined and constant stream in a subterranean channel."

The stream involved in this suit was determined to be a natural water-course flowing across the corner of plaintiff's land. The court held that the defendants had diverted that water from its natural course, and that the plaintiff was entitled *to injunctive relief* against the diversion, basing the decision upon the riparian

doctrine announced in *Taylor v. Welch:* We cite it further under the heading "Injunctive Relief."

Hayden vs. Long, 8th Ore., 245. (1880).

This was an action for the abatement of a nuisance and for damages.

Plaintiff alleged that he was the owner of certain real property, on which he had a machine shop and reservoir or pond of water, and that the same was continually used by him for water power in the manufacture of machinery, furniture and wagons; that the pond and water power were fed by a small stream, which the defendant wrongfully diverted from its natural and usual channel by unlawfully tapping the same above plaintiff's land and taking the water across to other lands by artificial ditches, to plaintiff's loss; that large quantities of water were constantly washed into plaintiff's pond, "to the nuisance of the said machine shop, water power, and land, and to his damage in the sum of $75.00."

The court held that the plaintiff (appellant),

> "being a riparian owner, was entitled to have the water run through his place, undiminished by the use of anyone, except such as own the land adjoining the stream above his land." (From page 247).

We direct the Court's attention to

> *Shaw vs. Oswego Iron Works,* 10 Ore. 375-6 (1881).

This suit, brought and determined prior to the issuance of petitioner's patent, was a suit to enjoin the de-

fendant from diverting the water of the Tualatin River from its *natural channel* into Sucker Lake, to be used for manufacturing purposes. Plaintiff Shaw alleged that he was the owner in fee simple of land lying at and near the confluence of the Willamette and Tualatin Rivers, at which point there was sufficient fall in the Tualatin at all seasons to propel a large flouring and saw-mill, and other machinery; that said waters can be diverted on and over said land at little trouble and expense, and by such diversion form a "*water privilege* and power of great value" and that the use of the water is now of *great prospective value* as a motive power to the plaintiff as the riparian owner of the land. That the defendant had commenced to construct a channel from said stream to divert the waters thereof from the natural channel, at a point about five miles above the plaintiff's land, and to turn said water into Sucker Lake, so that it will not again flow into the Tualatin; that *defendant has already cut and dug* such channel to such a depth so as to divert a large portion of said water to flow from the Tualatin into said lake, and threatens to make said canal deeper and wider, so as to divert more of said waters from their natural channel into said lake. That if permitted to do so, he will divert the same, to the great and irreparable injury of the plaintiff, and should be restrained.

The defendant sought to prevent the injunction, and to defend on the ground that the stream was a public navigable stream, and entirely in Oregon, which raised

the question whether the Tualatin was a public navigable stream. If so, it was conceded that the bed is *owned by the state,* and that the plaintiff's suit based on riparian ownership "ad medium filum aquae," *must fail* (Ore. Report 371-373). The court held that certain classes of streams mentioned are called navigable, in which the sovereign is the owner of the subjacent soil, and all right belongs exclusively to the public. *But that such streams as are non-navigable for any purpose* are in no way public highways, and that they are altogether *private* property.

The case held that streams that are capable of floating logs for *certain periods* of the year are navigable for that purpose, and subject to that use. But the court said that there is not a suggestion "that the *bed of such streams* is owned by the state." It held that the law recognized the right of a riparian owner to the middle of the stream, subject to the public servitude for log floating, and enjoining the defendant from diverting the stream from its channel. A quotation from this case, upon these subjects is set forth in Appx. 49,

Morgan vs. Shaw, 47 Ore., 333, (83 Pac, 534). Decided by the Oregon Court, May, 1884.

It is valuable here as it was decided prior to the issuance of petitioner's patent. It deals with the doctrine of riparian rights, as modified by the doctrine of *prior* appropriation.

We quote from it:—

Morgan vs. Shaw, 47 Orc. 333, (83 Pac. 534).

Quotation is from page 337:

> "3. Much importance seems to be placed by defendant upon the averment in his answer that he diverted water from a stream at a point on the public domain; and that as the plaintiff failed to allege such fact in the complaint, he, having given evidence thereof at the trial, had established the better right. *This contention is without merit,* for where, as in this State, the common-law doctrine of riparian rights, as modified by the rule of *prior* appropriation, is recognized, it follows that, as Dr. Stevens was a prior settler on public land through his title to the premises secured from the United States *related back* to the date of his settlement, which the Middle Fork of Burnt River flowed, and that stream was not flowing through public lands when the defendant made his diversion: *Brown v. Baker,* 39 Or. 66 (65 Pac. 799, 66 Pac. 193)."

The Weiss case was decided the year following the issuance of petitioner's patent. The case is

Weiss vs. Oregon Iron & Steel Company, 13 Orc., 496, 11 Pacific 255 (1886).

It is particularly valuable for these reasons:

That while the decision was rendered June 6th, 1886, the year following the issuance of petitioner's patent, yet it was dealing with lands that had been entered and patented long prior thereto. The case presents a thorough review of the common law riparian doctrine in Oregon, as the same was applied by the Oregon court, from the beginning of state-hood to the issuance of petitioner's patent, and from that date to the decision

of *Hough vs. Porter,* decided in installments; some in January, 1909, at the time of the convening of the Legislature, which passed the Water Code, and some in June, 1909, following the adjournment of the session.

The case is also valuable here because it has been many times cited in the Oregon court, as announcing the prevailing riparian doctrine. It was followed with full application of the common law riparian doctrine in the Harris case, decided in 1928, nearly four years *after* the decision in Re Hood River, and the decision in the Norwood case.

In this period there was, of course, applied the doctrine of appropriation, arising out of the Acts of Congress, and the customs of the settlers, principally miners. But the right to appropriate waters passing through riparian lands was always held to be cut off by the entry of the lands for settlement, if they were subsequently patented to the entryman. And such rights of appropriation were only held to be superior to the riparian rights of the riparian owner, when the appropriator had, by adverse possession for the period of prescription, taken the water from the riparian owner or entryman. From such adverse use arose the expression "riparian doctrine, as modified by the doctrine of *prior* appropriation." But the Oregon court had never held that an appropriator could enter upon the lands of the riparian owner to make an appropriation, nor deprive a riparian owner of the flow of the water through his

lands, except by such adverse use for the period of prescription, ten years.

The Weiss case was a suit by the plaintiff to enjoin the defendant from diverting the waters of the Tualatin River into Snake Lake for manufacturing purposes. The plaintiff alleged that he was the owner of land abutting upon Tualatin River, the southern boundary thereof, for about three-fourths of a mile from its confluence with the Willamette River, and, therefore, is the *owner of half* of the *river bed*, and entitled to have the waters of the river flow in their accustomed channel. Defendant denied this, and contended that the official survey and patent to the plaintiff's land did not include nor establish the claim of the plaintiff. The court held upon the evidence, that plaintiff's title was not doubtful nor difficult of ascertainment.

The Harris case (*Harris vs. Southeast Lumber Co.*), is discussed in connection with the Weiss case at Appx. 73-4. And it is quoted at length at Appx. 74-5-6, where it quotes the language of the doctrine of riparian rights, as announced in *Weiss vs. Iron Works supra.*

The Weiss case, at page 498, recites that one-fifth, and perhaps more, of the Tualatin is diverted from its course, and turned away from the other riparian owners; that the case differs essentially from a case in which the stream is diverted for manufacturing purposes, and the excess of water not actually consumed, is

restored; that it is a case of diversion of a part of the water course, not for ordinary purposes, but for manufacturing purposes, but, without restoring it to the channel. It then announces the riparian doctrine substantially as follows:

The owner has no property in the water, but a simple usufruct; he may use it as it passes along, but he must send down to his neighbor below as much as he has received from the neighbor above, citing Angell on Water Courses, Sections 90, 94, to the effect that as a general proposition every riparian proprietor has a natural and equal right to the use of the water in the adjacent stream to his land, without diminution or alteration, citing Washburn on Easements, 319; that, (quoting),

> "Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands, flow as it is wont by nature, without material diminution or alteration." (Gould on Waters, 204).

It then quotes Chancellor Kent, to the effect that though the riparian owner may use the water as it passes over his land, he cannot unreasonably detain it, or give it *another direction*, and must return it to its ordinary channel when it leaves his estate; that *without the consent of the adjoining proprietor* he cannot divert or diminish the quantity of water which would otherwise flow to proprietors below.

The opinion holds that a right to a water course be-

gins *ex jure naturae,* and having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owner below. It says this is the language of the common law text books, and the decisions, citing Angell on Water Courses, Section 93. It quotes Weston, J., in *Blanchard vs. Baker,* 8 Greenl. 266, that RUNNING WATER *is not susceptible of an appropriation* which will justify the diversion or unreasonable detention of it. It quotes Lord Ellenborough in *Bealy vs. Shaw,* 6 East. 208, 214, that the general rule of law is that every man has the right of the advantage of the flow of water in his own land without diminution or alteration. It quotes the Supreme Court of California, in *Pope vs. Kinman,* 54 Cal. 3, to this effect:

That by settled principles of both civil and common law, the riparian owner has a usufruct in the stream as it passes over his lands, *of which he cannot be deprived by mere diversion.* The author continues with further citations, Opinion 499.

The opinion then holds that the riparian owner has the right to reasonable use of the stream, without diminution or waste; he is entitled to use only so much as will not materially diminish its quantity, and may use it for *any legal purpose,* providing he returns the stream to its channel, uncorrupted, and without essential loss.

It holds that all authorities concur, that when

the amount abstracted . perceptibly or materially diminishes the quantity of the stream, such use by a riparian owner, *is unreasonable, and an infringement* on the other riparian owners, for which *the law furnishes redress,* Opinion 500.

It holds that the plaintiff in that case was entitled to have the natural flow of the stream *in its accustomed channel,* subject only to diminution and retardation incident to the usual use, and that whatever goes beyond this is an infringement of his rights in the stream, which may *form* the basis of a *presumption of grant by lapse of time,* and necessarily *imports damages,* and *entitles him to the protection of the law.* In other words, to an injunction, Opinion 500.

The opinion stated that counsel for the defendant, while admitting the rule of common law as to riparian owners is fatal to the defendant's claim, insisted that the rule needed to be *liberalized, and that the case presented a forceful illustration of the hardship and injustice of its operation.* Hence, it was the duty of the court to so extend and liberalize it, as to protect the defendant from the unjust consequences of its application. But the court quoted Black J., in *Wheatley vs. Chrisman,* that:

> "The necessities of one man's business cannot be the standard of another's rights in a thing that belongs to *both.*"

Because of the importance of the Weiss case in a con-

sideration of the law of this case we have quoted in the Appendix, (from the Oregon Report at pages 498-9-500 and 501), and upon the subject of "injunction" from 503. (Appx. 52-56) (In all quotations the italics and capitals are always ours, unless otherwise indicated).

Heretofore we have said that the riparian right enters the land upon the date of the issuance of the patent. This is correct except that the patent relates back to the actual entry of the settler upon the land, and cuts off future appropriations of water belonging to the lands because of their riparian character.

The leading case in Oregon upon the subject of relation back to the date of land entry is

Larsen vs. Oregon Railway & Navigation Co., 19th Ore. 240 (1890). (23 Pac. 974).

In this case the defendant Railroad Company wrongly entered upon plaintiff's land for the construction of a railroad across the same, and the plaintiff sought an injunction. The answer denied the allegations of the complaint, except that it admitted that it built and operated its road on said premises.

By way of separate defense it alleged that on the 1st of May, 1888, the land was *public land* of the United States; that pursuant to the Act approved March 3, 1875 granting a right of way over public lands, the defendant duly acquired a right of way over said lands for its railroad (using the terms of the grant to establish the acquisition of the right of way). Opinion 242.

The court said that it appeared from the bill of exceptions that the plaintiff settled on the land in controversy as a homestead in the month of December, 1886, or January, 1887, and in February, 1887, made the necessary filing in the Land Office, showing such settlement and claim. (Opinion 246).

That inasmuch as no patent had been issued and plaintiff's right was still possessory, the five years not having expired from the date of the commencement of the entry, the railroad company *claimed* that at the time of its entry the land was public land, leaving the power to Congress to dispose of it as it might think fit, citing the "*Yosemite Valley Case*, 15 Wall, 77, and *Frisbie vs. Whitney*, 9 Wall, 189."

The court held as follows: (page 246):

> "Such settlement and compliance with the act *severs* the land claimed as a homestead from the mass of public lands, and it is taken out of the act of congress of March 3, supra. This is the effect of the doctrine of *Wilcox v. Jackson*, 13 Peters, 498, and *Hastings & D. R. R. Co. v. Whitney*, 132 U. S. 357; and such is the construction given to this act in *Red River L. R. R. Co. vs. Sture*, 32 Minn. 95."

This case is followed in *Faull vs. Cooke* and *Brown vs. Baker*, two early Oregon cases, quoted below.

Faull v. Cooke, 19 Or. 455
(26 Pac. 662) (1890),

Was decided in the same term as the Larsen case. After the announcement of the opinion in the Larsen case, and while *Faull v. Cooke* was under consideration,

this court decided *Sturr v. Beck*, quoted at Appx. 57-9, and cited below. The latter case came to the attention of the Oregon court while it was considering *Faull v. Cooke*, and the court cited it, and held that it conclusively settled the legal questions in *Faull v. Cooke* against the appellant therein, and to the effect that a homestead claimant's riparian rights attached from the date of his settlement, and that when he complied with the law and got his patent, it related back to the date of the settlement and cut off, as of that date, the opportunity to make an appropriation that would deprive the homesteader of his riparian rights.

In *Faull vs. Cooke*, the plaintiff, Faull, alleged that in the year 1877 his grantors constructed a ditch out of Conner Creek, a natural water course in Eastern Oregon (Baker County) taking the same through the unoccupied public lands to a point known as Douglas Gulch, which emptied into Snake River, in said county; that the same was for the purpose of mining in said gulch, and for the sale of water to other miners, and to ranchers and farmers for irrigation; that at the date of said construction his grantors were the owners of all the ditches and water rights on said Conner Creek, below the point where his ditch tapped the same, and that he had a right at that point, to appropriate the waters, and did so appropriate the same. (Statement of the facts, 19th Or. 456-457). He then alleged continual use of the waters; that he made his appropriation accord-

ing to the local laws and customs of Baker County, and of the State of Oregon, and the decision of the state courts of Oregon, and of the United States, and that his location was and is prior to any other location by anyone on said Conner Creek (457); that in April, 1888, while Hill, to whom he had sold water for irrigation, was using the ditch for irrigation, the defendant Cooke wrongfully, and without color of right, cut the ditch and diverted the water therefrom, and let the same run to waste, thereby preventing Hill from using it for agricultural purposes; that such acts have continued since, and will continue, to the plaintiff's irreparable damage. (457-458).

The defendant denied the material allegations, and alleged that he was the owner of lands described in his answer, being about 160 acres of agricultural, fruit growing, and grazing land, through which land said Conner Creek flowed in its natural channel; that the defendant was a riparian owner and proprietor in and upon said stream, (458) and that he and his grantors were and had been seized and possessed of said lands, and of said creek and its waters, since the year 1869; that the said lands were now so used for said purposes and had been for eighteen years last past, and were of great value; that they required artificial irrigation, without which they would be worthless.

The defendant admitted that he cut the ditch.

The plaintiff replied, denying the new matter alleged

in the answer, and alleged, by way of avoidance, the following: (460)

That in the year 1875, Hinckler was the owner of the ditches and water rights claimed to be owned by the defendant; that in said year, all of Hinckler's rights were sold by the sheriff of Baker County under execution on a judgment against Hinckler; that plaintiff's grantors were the purchasers of the ditches and the water rights at the sheriff's sale; that said sale had been confirmed, and a deed conveying the ditches and water rights had been made by the sheriff to the plaintiff's grantors, as directed in the order of confirmation; that since receiving it, plaintiff and his grantors had been the owners, and entitled to the sole use and possession of the same, up to the diversion thereof by the defendant, as the act had been alleged in the complaint. (461).

By the reply, the plaintiff also pled the Statute of Limitations against the rights claimed by the defendant (riparian). The sufficiency of the pleadings was not raised. (461)

THE OPINION IN FAULL V. COOKE, 19 OR. 461.

Here it is stated: That in 1869, the lands through which Conner Creek flows, and which are described in the defendant Cooke's answer, were unsurveyed and unoccupied public lands of the United States; that during that year, said Hinckler settled upon the same as a homestead, and, after the said lands had been surveyed, on the 6th of March, 1883 he made his regular applica-

tion therefor, alleging his settlement thereon in February or March, 1869; that upon this application, a patent was issued in March, 1885. **(Petitioner's patent, (Defendants' Ex. W, was issued April 20, 1885) (R. 301-3).** The opinion continues,—that after Hinckler had perfected his right under the homestead laws, he died, and the title to the property was conveyed to Cooke through an administrator's deed. (461-2).

We find it advisable to here set forth a quotation made from *Faull v. Cooke* in the Appx. at 59-60, in order to continue the quotation further.

Quotation from page 463 of 19th Or. Rep.:

"In *Larsen v. The O. R. & N. Co.*, decided at the present term, it was held, in effect, that a settlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co., supra,* this case was argued, and *our attention has been called to the recent opinion of the Supreme Court of the United States in Steers v. Beck,* 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it was held that a *homestead claimant's riparian rights attached from the date of his settlement,* provided *he complied with the law* and obtained a patent for the land, and that when such patent

was issued it related to the date of settlement *and cut off the right to divert a stream of water running through such homestead.*" (Appx. 59-60).

The foregoing quotation continued:

"But the plaintiff claims to have the superior right to this water, and he seeks to prove title to the same in two ways: first, through an ex-sheriff's deed offered in evidence purporting to convey certain ditches and water rights of Hinckler to A. J. Lawrence; and, *second, by prior appropriation and adverse possession of the water for more than ten years.*" * * * * *

"The remaining question is whether or not the plaintiff and those under whom he claims had acquired a title to this water by adverse user prior to the commencement of this suit? Did the plaintiff and those under whom he claims have such *open, exclusive, notorious* and *continuous adverse* use of this water as to bar the rights of the defendant either as riparian owner or first appropriator of it? * * * * Giving full effect to the evidence on each side, and it appears that for several years no one had the exclusive use of the water; sometimes one was using it and then another, but the possession of none of the claimants was continuous or of such a character as to constitute adverse possession against the others. It was intimated on the argument by the appellant's counsel that the water in controversy ought equitably to be divided between the parties; but I am unable to find in the evidence anything whatever upon which a division might properly be made."

Sturr, Appellant, v. Beck, 133 U. S. 541-552, 33 Law Ed. 761. (Decided March 3, 1890).

The court stated the facts involved, in substance as follows:

Sturr brought this case against the defendant Beck

in the District Court for the territory of Dakota, to prevent the defendant from interfering with plaintiff's alleged water right and ditch, and the use of the water of the creek through the same, alleging prior interference. The allegations were denied, and the defendant alleged the facts as he claimed them, and asked an injunction against the plaintiff from diverting the waters of the creek. The cause was tried on an agreed state of facts, reduced to a stipulation, which is set forth in the U. S. Report at pages 542-5, substantially as follows:

1st. Plaintiff Sturr made a homestead entry May 15th, 1880, final proof May 10, 1883, having settled on the land in June, 1877.

2nd. That John Smith made a homestead entry on other land March 25, 1879, final proof May 10, 1883, (same date), having settled thereon March 1877, (the other was June, 1877); Smith resided thereon until he sold to defendant Beck in May, 1884, and received a patent therefor.

3rd. That on May 15, 1880, plaintiff Sturr, without grant from Smith, went upon Smith's homestead and located a water right *thereon*, claiming the right to divert the waters from the creek flowing across said land in its natural channel, and to carry the same to his own homestead immediately adjacent.

4th. Plaintiff Sturr posted written notice at the point of diversion claiming the right to divert the same and filed it in the office of the County Clerk.

5th. That immediately thereafter plaintiff constructed a ditch from the point of diversion across Smith's homestead, and conveyed the water from said stream to his adjacent land, where he used it for irrigation until interfered with by defendant in the summer of 1886.

6th. May 1st, 1884, Smith conveyed his homestead to defendant Beck, by warranty deed without reservation, who immediately entered into possession.

7th. In 1886 defendant Beck notified plaintiff Sturr to cease the diversion from their natural channel upon the defendant's lands, and forbade him maintaining a ditch thereon.

8th. That the custom existing in the county since its settlement recognized the right to locate water and to appropriate it for irrigation when such location and diversion does not conflict or interfere with vested rights accrued prior thereto.

9th. Neither Smith nor defendant Beck ever made a water location claiming waters from said stream, nor had they ever prior to the plaintiff's appropriation diverted water from the channel of the creek where it had been accustomed to flow.

10th. That Smith on the 2nd day of February, 1882, recited in the written contract of that date, made with plaintiff, that the latter was the owner of the "Elm Tree water right," which was said water right located by Sturr, May 15th, 1880.

11th. That such water for irrigation is valuable to those owning or possessing the same.

Mr. Chief Justice Fuller, after stating the facts, delivered the opinion from which we quote at 133 U. S. pages 546, 547:

> "John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.
>
> It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water right location claiming the waters of False Bottom Creek, and had never diverted those waters prior to Sturr's location.
>
> If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of *March* 25, 1879, and possession *thereunder,* or if *his patent* took effect as against Sturr by relation as of *that date,* then

it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor of a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. * * *

Here the court enters into a discussion of the United States statutes governing settlement upon public lands, and the homestead requirements as to residence thereon. And of the Act of July 26, 1866, granting rights to the use of water on public lands.

We quote further from the opinion, pages 550, 551:

By Section 17 of the Act of July 9, 1870, amendatory of the Act of July 26, 1866, it was provided, among other things, that 'all patents granted, or pre-emption or homesteads allowed, shall be subject to any *vested* and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as *may have been acquired* under or recognized by the ninth section of the Act of which this Act is amendatory.' 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and *Smith's patent was subject to that reservation.*

The 9th section of the Act of 1866 is referred to by Mr. Justice Field in *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 512 (22: 414, 416), and in the

opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

WHEN, HOWEVER, THE GOVERNMENT CEASES TO BE THE SOLE PROPRIETOR, THE RIGHT OF THE RIPARIAN OWNER ATTACHES, AND CANNOT BE SUBSEQUENTLY INVADED. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriations of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

Following this the decision quotes from the Dakota statutes. The decision concludes:

"Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect."

As stated in *Faull vs. Cooke,* supra, this decision came to the knowledge of the Oregon Court after its decision of *Larsen vs. The O. R. & N. Co., supra.* The

decision in the Larsen case was made May 16, 1890 (19th Ore. 240).

Sturr vs. Beck was decided March 3rd, 1890.

Foull vs. Cooke was decided July 1st, 1890, (19th Ore. 455). So the Larsen case rested upon the doctrine as announced in this court in the two cases shown in the quotation therefrom, made from page 246 of 19th Oregon.

Brown v. Baker, 39 Or., 66-75; (65 Pac. 799; 66 Pac. 193). Decided July 15, 1901.

This was a suit to enjoin interference with the flow of the water in the *channel* of a non-navigable stream. That in 1864 one Morrison, plaintiff's predecessor, diverted said water and used the same for the irrigation of his cultivated land. That his diversion proved inadequate, and he dug a ditch in 1866 and diverted more water from a tributary thereof, and used it for irrigation of said lands.

In 1892 the defendants, having purchased lands above those of the plaintiffs on said stream, diverted the water from the stream in 1896, which they used for the irrigation of their premises; whereupon plaintiffs, claiming such use to be a wrongful infringement of plaintiffs' rights, instituted this suit.

And the lower court decreed the plaintiffs to be entitled to a specified quantity of the water of said stream through plaintiffs' ditches, and enjoined the defendants from interfering with the flow of that quantity in

the *channel* of said creek through their premises, from which decree the defendants appealed.

The defendants maintained that in order to secure priority in appropriation of water, the diversion must be made on public domain, and the plaintiffs must allege that their diversion was on their own premises. The court held:

That the water of a non-navigable stream is an incident to the soil through which it flows; that as the United States is the primary proprietor of public lands, its grant to the waters thereof in the Pacific Coast states, to the person having the priority of its possession, in the absence of a constitutional provision or statute declaring water to be public property, necessarily cuts off the right of a subsequent settler to divert the water under a claim of prior appropriation. That title by relation gives to the first settler upon public land *priority of possession of the water flowing through the same.* It cited *Faull vs. Cooke, Larsen v. Oregon Ry. & Nav. Co., Johnson v. Bridal Veil L. Co.,* 24 Ore. 182, 33 Pac. 528; *Cole v. Logan,* 24 Or. 304, 33 Pac. 568.

And it held that this is so, though the first settler may never appropriate the water to a beneficial use; that if a lower appropriator had acquired a right to the waters of the stream before plaintiffs' diversion, such rights would defeat their appropriation of the water, because the stream at the time of the diversion *was not flowing through public lands.* It held that the right

of a prior appropriator is limited to the use of water by the pioneer settler (appropriator), *before* any adverse claims of riparian proprietors attach to the stream from which the water is taken, and not from the points of diversion, which may be either within or beyond the boundaries of the tract selected by such settler.

We have quoted this case, the substance of which is here stated, at the Appx. 60-61.

In the Hood River case Mr. Justice McCourt at 114th Ore., 214-248, dissented to the opinion of the majority court. In that dissenting opinion it was stated that to initiate title to the use of water by adverse user, as against a riparian owner, there must be a hostile invasion of the rights of the latter, to use the water, which must continue uninterrupted for the period of prescription. There is no doubt as to this being the law, and we are not citing the dissenting opinion as authority, but merely to bring before the Court the cases listed in support of that text. They are six in number, and the decisions were made in the following years: 1899, 1901, 1902, 1908, 1912. A quotation from that opinion is set forth at the Appx. 62, a reference to which will serve the purpose of citation of those cases.

Cole vs. Logan, 24 Ore. 304,
(33 Pac. 568) (1893)

This was a suit between two water users from the same stream, both of whom were early settlers. Each

claimed under the doctrine of *appropriation*, and the decision was made accordingly.

This decision was cited in *Brown vs. Baker, Supra*, under the doctrine of "title by relation," as announced in the Larsen case, *Faull vs. Cooke, et al.* A sufficient statement of the facts is shown in the following quotation, which we make from 24 Ore. 308., to show the application of the "doctrine of relation," to appropriations.

> "1. The evidence conclusively shows that the defendant was a prior appropriator of the waters of Willow Creek. He made his settlement upon an unsurveyed tract of land with the intention of acquiring title thereto from the government of the United States, and had diverted and appropriated the water of said creek two and one-half years prior to the building of plaintiffs' dam, and when the defendant made his proof and obtained his patent his title related back to the time of his settlement: *Faull v. Cooke*, 19 Or. 455 (26 Pac. 662); *Larsen v. Or. Ry & Nav. Co.* 19 Or. 240 (23 Pac. 974); *Sturr vs. Beck*, 133 U. S. 541, (10 Sup. Rep. 350); and hence it follows that at the time plaintiffs made their appropriation of the waters of Willow Creek, the defendant's rights as a prior appropriator had attached, and he was entitled to the quantity of water he had diverted and appropriated for the purpose of irrigating his homestead, and that the plaintiffs made their diversion and appropriation subject thereto: *Kaler v. Campbell*, 13 Or. 596 (11 Pac. 301).

United States v. Rio Grande Dam & Irr. Co.,
174 U. S., 690; 43 L. ed. 1136.

This was a suit by the United States, through the

Attorney General, brought in 1897, to restrain the building of a dam in the Rio Grande River in the Territory of New Mexico, being built for the appropriation of the waters of the stream for irrigation. The decision by Mr. Justice Brewer deals with some of the subjects with which we are concerned, and particularly the history of the doctrine of prior appropriation on Government land, and its relation to the riparian doctrine, when those lands are patented. We quote from that portion of the opinion which deals with the Act of July 26, 1866. (At 174 U. S. 704).

> "Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and effect only questions between citizens of the state, nothing is presented which calls for any consideration by the Federal courts. In 1866 Congress passed the following act (14 Stat. at L. 253, chap. 262; Rev. Stat. 2339):"

We quote the acts of Congress of July, 1866, and July 1870, set forth in:

Section 661, Title 43, U. S. C. A.:

"Section 661. Appropriation of waters on public lands; right of way for canals and ditches. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.
(R. S. §§ 2339, 2340).

The editor's comment, following said section, is as follows:

"The first paragraph of this section before incorporation into the Code was R. S. § 2339, which was derived from Act July 26, 1866, c. 262, § 9, 14 Stat. 253.

The second paragraph was derived from R. S. § 2340, which was derived from Act July 9, 1870, c. 235, § 17, 16 Stat. 218."

This is helpful in tying in the common law doctrine of riparian rights prevailing in Oregon, as modified by the doctrine of "prior appropriation." Congress thereby ratified the acts of settlers in making appropriations upon *public lands*. And we have seen that these lands cease to be public, when entered for settlement, if the settler complies with the law and obtains the patent. On the issuance of the patent, the settler's rights relate back to the date of the entry. And the riparian rights to the lands accompany the lands as part thereof, even though the settler does not own the water, but has only a usufruct therein.

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS.

While we maintain that the legislature cannot declare the law so as to impair rights that have already vested under existing laws, it can declare what the law shall be in the future.

This title deals with the legislative recognition of the riparian doctrine which we contend is valuable only as showing the prevailing belief in Oregon at the times at which legislative acts were passed in which the riparian doctrine was recognized as existing. And as the court will know, legislative acts are passed more or less under the guidance of men learned in the law, so far as they involve legal questions. Hence, the courts

indulge the presumption that the legislature knew, or is presumed to know the law. But they have never allowed the legislature to tell the courts what the law is.

With this statement of our position, we call the court's attention to the following legislative enactments of Oregon in which the riparian rights, arising from the location of the lands upon the streams, were recognized and dealt with. These enactments are informative particularly because of the times at which they were passed with reference to the date of the petitioner's patent, (1885) and the passage of the Water Code (1909), (Appx. 40-45). We quote from these acts at the pages in the Appendix mentioned, below.

LAWS OF OREGON, 1891.

"An Act allowing the condemnation of rights of riparian proprietors arising from their locations," etc., allowing a condemnation and appropriation of the right to the flow of water in any stream from which it is proposed to divert water below the point of diversion "*vested* in owners of lands lying contiguous to such stream by virtue of their location." It will be seen that this act saved to the riparian proprietor water for his household or domestic use and enough to irrigate his growing crops, and actually used therefor. The rest could be condemned. (Appx. 40-41).

OREGON LAWS 1895

Providing that nothing in the Act should authorize

any person to divert waters from any river, creek, stream, etc., from its channel

> "to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein"

except upon compensation paid. (Appx. 41-2).

OREGON LAWS 1899.

An Act to provide for appropriation and "condemnation of rights of riparian proprietors arising from their location," etc. It allows condemnation and appropriation below the point of diversion vested in the owners of lands

> "lying contiguous to such stream by virtue of their location." (Appx. 42).

OREGON LAWS 1903, Special Session

Allowing condemnation and appropriation of the right to the flow of water in any stream from which it or they may propose to divert water below

> "the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location," etc.

Of this the Oregon court stated, it was not intended to deprive or even abridge the rights of a riparian proprietor. (Appx. 43).

OREGON LAWS 1901.

Allowing condemnation of rights of riparian proprietors arising from their location as being contiguous to the stream. (Appx. 44).

OREGON LAWS OF 1905.

Allowing condemnation of real property, water, water courses and riparian rights in Oregon for public use.

It is still in force and is now Section 37-302, Oregon Code 1930. (Appx. 44-5).

(2) The riparian right is a vested right and as such is under the protection of the 14th Amendment to the Federal Constitution, providing that no State shall deprive any person of his property without due process of law. (Sec. 1 of the 14th Amendment).

VESTED RIGHT DEFINED.

Pearsall v. Great Northern R. Co., 161 U. S. 646-677; 16 Sup. Ct. 705; 40 L. Ed. 838.

(The quotation therefor being taken from 161 U. S. 673).

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an *immediate fixed right of present or future enjoyment;*' and by Chancellor Kent as an 'immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent, Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to

come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Cooley, Const. L. 332."

We also cite the following: (Appx. 82)

Crump v. Guyer et al, 157 Pac. 321, 322; (Supreme Court of Oklahoma, Feb. 29, 1916).

That case is also valuable here for the citations there quoted at Appx. 82-3-4.

The authorities cited at page 84 of Appx. are to the effect that

such a right is not lost by nonuser.

At page 85 of Appx. we quote

Ruling Case Law,
Volume 6, Sections 294 and 295 (page 308)

defining vested rights, their nature and origin.

We insist that petitioner's riparian rights are vested rights under the foregoing definitions.

RIPARIAN RIGHTS ARE VESTED RIGHTS

We quote from

Yates vs. Milwaukee, 77 U. S. (10 Wall.) 497-501, (19th Law Ed. 984).

This suit decided in 1870 was to prevent the City of Milwaukee, from, by an ordinance, destroying Yates' riparian rights on the Menomonee and Milwaukee Rivers in the City of Milwaukee. While it is true the rights were on the banks of navigable streams, it is also true that the riparian rights upon both navigable and

non-navigable streams, are vested and under the protection of the amendment.

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, at 43 L. Ed. 1136, 1141; (1899).

quotation from 174 U. S. at 702:

> "The unquestioned rule of the common law was that *every riparian owner* was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439):
>
> > 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land *as an incident to the land* he cannot unreasonably detain it, or give it *another direction* and he must return it to its ordinary channel when it leaves his state'."

—The Supreme Court of Oregon on March 25, 1919, in the case of

Hanson v. Thornton, 91 Or. 585, 591 (179 Pac. 494).

Speaking through Mr. Chief Justice McBride, likewise determined that *riparian rights are property rights* and *that any violation* of the riparian right is the *taking of private property,* which cannot be done without just compensation.

We quote from page 591 of 91 Or.:

> "One who purchases land abutting upon a lake or water-course, usually considers his right of access to such waters as an element of value in the purchase. When we speak of riparian rights, we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a *usufruct* in the water. To say that the owner of such a right may without his consent be deprived of it by the state or the general government permitting some other person to obtain title to the accretion formed by an impounding or diversion of part of the waters that previously washed the shore of his land does not appeal to our sense of justice and we do not believe that the authorities generally support such a doctrine."

NEBRASKA

Clark vs. Cambridge & A. Irr. & Imp. Co. et al, N. W. Vol. 64, 239, 241. (Supreme Court of Nebraska, Sept. 18, 1895). (Quoted at Appx. 76-77).

This case holds directly that the right of a riparian proprietor *as such* is property, and when vested can

only be taken upon full compensation, and in accordance with established law. It cites the well known case *of Lux vs. Haggin,* (California), *Yates vs. Milwaukee, supra, Potomac Steamboat Co. vs. Upper Potomac Steamboat Co.,* 109 U. S. 673, and other authorities.

Mansfield vs. Balliett,
L. R. A. Book 58, 1903, 628-637
(Ohio Supreme Court, January 21, 1902).

The opinion in this Ohio case holds that authors who have investigated are agreed upon the conclusion that riparian rights are property within the meaning of the Constitution; that the right is a part of the property in the land, and in many cases constitutes its most valuable element. Here the opinion applies particularly.

The court held that it followed that any violation of that right in the exercise of the power of eminent domain is a *taking of property* for which compensation must be made. We quote from the opinion at Appx. 94-5.

Martha Lake Water Co., No. 1 *v. Nelson et al.,*
277 Pac. 382,
(Supreme Court of Washington, May 2, 1929).

This is a Washington case. The opinion quotes the Washington Constitution preventing private property from being taken, or damaged for public or private use without just compensation. This case is applicable here. It is concerning the lowering of the waters of Martha Lake, causing the water's edge to recede, and land which had been covered with water *at the time*

of its purchase to become dry land. It held that the provision of the Washington Constitution cited entitled the owner to compensation.

In our case respondent Cement Company would change the thread of the river 100 to 150 feet, and leave us the rocky, dry river bed where once the river flowed.

CALIFORNIA.

Lux vs. Haggin,
69 Cal. 255, 10 Pac. 674.
(Apr. 26th, 1886).

This is one of the strongest cases in the books supporting the petitioner's position here. From our reading, we believe that it has been quoted more, with approval, than any other of the western riparian right cases. It announces the common law riparian doctrine for which we contend. It holds that it has always been held that the grant of the land carries the grant of the water flowing over the soil. That the right of a riparian proprietor to have the stream run through his land is *a vested right,* and interference with it imports damage.

We quote substantially from the opinion at Appx. 96-7. The case is cited in the text by

Wiel, Water Rights in the Western States,
2nd Edition, Section 56, page 115.

We quote that section at Appx. 97.

Lux vs. Haggin, supra, from the Supreme Court of California, decided about the time of the decision in the Weiss case, was cited with approval by the Oregon court in 1891, in the following case:

Hindman vs. Rizor, 21 Ore. 112,
27 Pac. Reporter, 13.

The court said at the Oregon Report, 114:

"This is a suit to enjoin the defendant from diverting the waters of Alder creek, a natural watercourse, which runs through the lands of *both* plaintiff and defendant. Both parties claim by prior appropriation.

The facts are these: In 1863 the lands through which Alder creek flows were unsurveyed and unoccupied government land, and the waters thereof were free and unappropriated."

In the spring of 1863 Cleaver and Peters settled upon the plaintiff's land, and for the purpose of rendering it more productive entered on the unoccupied government land a short distance above plaintiff's land and diverted waters from the stream in question.

In February, 1877, the defendant settled upon the lands owned by him above the lands of the plaintiff (as a homestead), received his patent, and against the rights of the plaintiff claimed rights to use certain of the waters of the stream as against the plaintiff's appropriation. Defendant claims that because the title of several of those occupying the land from Cleaver down to Rowley had been acquired by the purchase of the possessory rights only, and not by deed, that the right was lost and abandoned; that the water right could only be transferred by deed; that he was in consequence of his appropriation of 1877, prior in right to the appropriation of the plaintiff, which in any view

could only date from Rowley' settlement in 1881. In 1881 Rowley had by other such transferred possessory rights acquired possession of plaintiff's property and filed thereon, perfected title to the property in 1882, and deeded it to the plaintiff.

The Oregon court said: (pages 116-17)

> "This is the only question necessary for us to consider. If plaintiff has connected herself by a proper title with the rights acquired by Cleaver and Peters to the waters of Alder creek, her rights are unquestionably superior to those of the defendant, for whoever purchases land from the United States after the whole or some part of the water of a natural water-course running through such land has been appropriated by some one else, takes subject to the rights acquired by such prior appropriator. (*Kaler v. Campbell,* 13 Or. 596; *Lux v. Haggin,* 69 Cal. 255). If however, her rights only date from the settlement of Rowley in 1881, the appropriation made by defendant in 1877 gives him a superior right to the quantity actually appropriated."

Of course, all rights involved were rights gained by appropriation. But the Oregon court followed *Lux vs. Haggin* to the effect that whoever acquires land from the United States after some of the water of the natural water course running through it has been appropriated by some other person, takes the land subject to such prior appropriation.

The doctrine of *Lux vs. Haggin* relative to riparian rights is discussed below in connection with the encroachments by the California Act of June 16,

1913, (creating the Water Commission), with regulatory powers, and the California Constitutional Amendment of 1928, as they have been applied by the California court. This Legislative Act and the Amendment to the California Constitution, with California cases, is discussed herein under the heading of the "Police Power," and particularly at pages 214-239 hereof.

The Fall River Valley District case, (cited below), held that the Commission Act (assuming it to be valid) did not impair riparian rights which had vested prior to its passage. And as to riparian rights and rights by appropriation, the decision held that the California court must give effect to its own decisions pronouncing that a mere appropriator, until he obtains title by prescription, is as against the right of a riparian owner, a trespasser, citing

Pabst vs. Finmand,
190 Cal. 124, 132,
(211 Pac. 11, 14).

RIGHT NOT LOST BY NONUSER.

We also there cite:

Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation, 202 Cal. 56, 259 Pac. 444, 448. (Supreme Court of California, Sept. 1, 1927) (Appx. 77).

It is to the effect that the riparian right is a vested property right inhering in and part and parcel of the abutting land; it is a right not gained by use, *nor lost by*

disuse, qualified only by the rights of other riparian proprietors on the stream. It then asserts the riparian doctrine of the ordinary natural flow undiminished, etc., as announced in the Oregon cases cited. It holds that such a right is entitled to the same respect and protection at the hands of the law as any other vested property right.

Please also see

Ruling Case Law, Volume 27, page 1071, Subdivision 12, quoted at Appx. 78.

Riparian Rights as Property. The text is to the effect that such rights are an incident to the ownership of the land adjacent to the water, and may be lost by grant, condemnation or prescription; that they cannot be taken by the state for public use without compensation to the owner, and cannot be taken at all or impaired for a private use.

SOUTH DAKOTA

in

St. Germain Irrigating Co. v. Hawthorn Ditch Co., 143 N. W., 124-128, (Supreme Court of South Dakota, Sept. 23, 1913),

also held such rights to be vested property rights and under the protection of the Amendment. (At Appx. 78). We quote from that court, taking the quotation from 143 N. W. at 126.

At pages 90-1-2 of the Appx. we quote from

Brewer-Elliott Oil & Gas Co. v. United States, 270 Fed. 100-110, (affirmed by this court, 260 U. S. 77-89, 43 Sup. Ct. 60, 67 L. Ed. 140-147).

The importance of this case is, of course, emphasized by the fact that it was affirmed on appeal in this court. It is to the effect that the government disposes of its riparian rights at the times of the respective grants, and makes no reservation in the grants for the future. That when once vested the owner cannot be deprived of the riparian right except in accordance with established law. That if it is necessary to take it for the public good, it must be upon due compensation. It cited *Yates vs. Milwaukee, supra.*

We commend the court's attention to the quotation at Appx. 90, 91.

The case was affirmed upon appeal, and this court said:

That it is not for a state, by courts or legislature, in dealing with the general subject of the *beds* of streams, to adopt a retroactive rule for determining navigability which would destroy a *title already accrued under federal law and grant.* (And we say here that when the riparian lands on both sides of the river were patented, that the river bed and the water were common to both, under the Federal Statute of May 18th, 1796, above referred to. So far as the doctrine of riparian rights is concerned, this statute was but an affirmance of that right, but it was read into, *and it became a part of*, the patents to the riparian lands of both the

petitioner and the respondents. So too, the statute stated the acknowledged and established common law rule, which should apply irrespective of the statute).

This Court further held in the Rio Grande case that where government patents contain no words showing a purpose to define riparian rights, the intention to abide the state law is inferred, quoting (Appx. 92),

Hardin v. Jordan,
140 U. S. 371, 384,
35 Law Ed. 428, 434.
11 Sup. Ct. Rep. 808.

That riparian rights are vested rights and protected by the Constitution, we also cite:

Thiesen v. Gulf, F. & A. R. Co.,
L. R. A. 1918 E., 718-738 (Fla.)
(Decided November 3, 1917).

This Florida case quotes Mr. Justice Miller in *Yates vs. Milwaukee, supra,* that when once vested, such a right cannot be taken, even for public good, except upon due compensation, (citing).

The court said that riparian rights were property rights; that in many cases the riparian rights incident to the ownership of the land, were perhaps the principal, if not the sole inducement leading to its purchase, and the reason for the price charged by the seller.

Petitioner is shown in the record to have acquired the land for its power purposes, and it is shown to have no value except therefor. It is peculiarly well situated for petitioner's stand-by plant to furnish power during

times of break down in the service on the main feeders.

(We quote from this case, Appx. 93).

Retroactive Acts.

The Appellate Court followed the Oregon Court in Re Hood River, in this respect,—that Section 70 of the 1909 Water Code, (Appx. 29-31) particularly Subdivision 2 thereof, (Appx. 29) destroyed riparian rights which had not been put to a beneficial use at the enactment of the code.

If that construction be applied to petitioner's riparian rights, it takes petitioner's property in violation of the 14th Amendment. It, in effect, holds that said section of said water code is *retroactive*. It causes this legislative fiat,—this usurpation of the functions of the judiciary,—to step back to 1885, the date of petitioner's patent, and, by *definition*, destroy its vested riparian rights. Such statutes, being thus *violative* of the amendment, must be construed as prospective and *not retroactive* in the application.

(3) Legislative Acts Impairing Vested Rights Must Be Construed as Prospective Laws, Not Retroactive Laws.

We quote from this court, as follows:

Sturges vs. Carter, 114 U. S., 511-523 (May, 1885), 5 Sup. Ct. 1014, 29 Law Ed. 240-244; Quotation from 114 U. S. at page 519.

"In the case of *The Society for Propogating the Gospel v. Wheeler*, 2 Gall. 139, Mr. Justice

> Story thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, *must be deemed retrospective*'." (Appx. 85).

We also cite:

> *Wilkinson*, plff. in Error, *v. Leland*, Dfdt. in Error, 27 U. S. (2 Pet.) 658; 7 L. ed. 553

We further cite the following authorities from the citations made in the appendix hereto, at the pages indicated below.

> *Hoyt Metal Co. v. Atwood*, 289 Fed. 453, 454-455; (Ill.) (1923) (Appx. 85-86)

This Federal case holds, citing numerous authorities, that a vested property right cannot be taken by the declaration of a retroactive act, and that where retrospective acts would destroy vested rights, they are presumed to be prospective only, unless the contrary *clearly* appears.

In the instant case such intention does not clearly appear from the language used. Subdivision 2 of Section 70 provides that the application of the water to a beneficial use prior to the passage of the act, "shall be *deemed to create* in such *riparian proprietor* a vested right to the extent of the actual application to beneficial use." Note that it *does not say* that *these rights*, such as petitioner's, which had not been used, *were not vested*

rights. The language used was in an effort to convert the used riparian right into an appropriation, as shown by the provisions of Subdivision 3 of Section 70, which provides for the completion of facilities for the use of the water, the construction of which had already been begun. Such a construction applied, cuts off the riparian doctrine completely, and destroys it, and we have nothing left but rights by appropriation. Properly and constitutionally construed, the water code leaves petitioner's riparian right as it was when petitioner's patent was issued.

Favot vs. Kingsbury, 98 Cal. App. 284; 276 Pac. 1083; (April, 1929) (Appx. 86).

Here the California court held:

That the state has no power to divest or to impair vested rights by legislative enactment, municipal ordinances or change in its Constitution.

Travelers' Ins. Co. v. Ohler, (Neb.) 227 N. W. 449, 450. (November, 1929) (Appx. 87).

Here the Nebraska Court said that a legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively, where it will have the effect to invalidate or impair the obligation of a contract, or interfere with vested rights, citing 2nd Lewis' Sutherland, Statutory Construction (2d Ed.) § 642, and other authorities.

Board of Sup'rs. of Arenac County v. Board of Sup'rs. of Iosco County, 122 N. W. 629; (Sup. Ct. of Mich., Oct. 4, 1909.) (Appx. 87).

Here, the Supreme Court of Michigan held that rights which had been vested by statute were not lost by a later amendment thereof. It laid down these rules: (1) That statutes will not be construed as retroactive unless the intent that they should be retroactive clearly appears (citing); and (2) A statute cannot be construed retroactive to the detriment of vested rights. (Citing).

Crawford Co. v. Hathaway et al., 93 N. W. 781. (Sup. Ct. of Nebraska, Feb. 4, 1903.) (Appx. 88).

Here, the State of Nebraska, by its legislative act, attempted to abrogate the common law riparian doctrine, and to substitute in lieu thereof the doctrine of appropriation. The court held that this legislation could not have the effect of abolishing riparian rights which had already accrued, but could only have the effect of preventing the acquisition of such rights in the future. And it said that such a law is only applicable to those waters which were unappropriated; "or any other waters which have not become the property of riparian proprietors."

L. D. Lowe and Wife v. James Harris, L. R. A., Vol. 22, 379; (North Carolina Sup. Ct., May 5, 1893) (Appx. 88).

In this case, the Supreme Court of North Carolina said that the legislative act under consideration could be held to modify or repeal the statute of frauds, but it

could *not* have retroactive operation, this being restricted by the fundamental rule that no law which operates to disturb or destroy rights already vested, shall be construed to operate *retrospectively*. It said that no law which *takes property from one* and *vests it in another* for the other's own private purposes, and without the owner's consent, has ever been held to be a constitutional exercise of the legislative power in *any* state of the Union (citing authorities).

See also:

Ruling Case Law, Vol. 6, page 305, Section 291 (Appx. 89-90).

The author, at Section 293, page 307, also says that statutes retrospective in their character and operation directly affecting and divesting vested rights, are generally construed as founded on unconstitutional principles, hence inoperative and void.

(4) THE OREGON WATER CODE, AS CONSTRUED IN THE HOOD RIVER CASE, SUPRA, AND IN THE OPINION OF THE APPELLATE COURT, IS VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

In support thereof, the petitioner maintains that subdivision 2 of Section 70 of the Water Code, as so

construed, destroys the vested rights of petitioner, upon the ground that its riparian rights had not been used at the date of the enactment of the code. It especially preserves to some extent, such rights in riparian proprietors who had used their rights for beneficial purposes prior to the enactment of the code, but denies this same right and privilege to all who had not so used their own vested rights, and in which class is petitioner.

In that respect the subdivision No. 2 of Section 70 permits the riparian proprietor who had so used his right before the enactment of the code to retain the priority of his right to the use of the waters as of the date that he acquired the riparian right. Carefully considered, this seems to us to create a right by appropriation as of the date of the settlement upon the land.

By subdivision 2 and subdivision 3 of Section 70, such riparian rights as are so preserved, are continued to the extent of the actual application to a beneficial use. Under subdivision 3, works begun for the use of the water prior to the enactment of the code, must be completed within a reasonable time after the passage of the act.

This construction amounts to a classification of the holders of riparian rights which have been vested, viz.,

Class 1 includes petitioner, whose rights are "abrogated." (R. 450, 73 F (2d) 569).

Class 2 includes those who had, at the enactment,

made some use of the water, and who were allowed to proceed therewith and complete the use which they had begun by the development of whatever projects they had started. From that time on under said interpretation of the code, they would proceed as riparian owners with a vested right, limited as aforesaid, to the extent of the use made at the enactment, with the right to complete constructions formerly begun.

From a consideration of Section 1 of the act, there arises a third class of users.

In this class are the respondents. They have attempted to initiate rights by appropriation, based upon permits issued under said section 1.

We contend that Section 1 makes such appropriations *subject to existing rights.* And of course we maintain that under all circumstances, the respondents' permits are issued subject to the existing common law riparian rights of the petitioner. The construction so put by the state court upon these sections of the water code, *deny* to the petitioner the *right of priority as of the date of its settlement upon the land,* purely upon the ground that it had not put the water to a beneficial use before the enactment of the Code. Inasmuch as there was never any law requiring the riparian proprietor to use the rights at any particular time, *nor was any notice of any kind ever given* that such an enactment as the Water Code, with its emergency clause, would cut off riparian rights *that had not been*

so put to a beneficial use, petitioner's property is taken *without an opportunity* to make a use, which, under the act would save it from confiscation.

There is the further discrimination and denial of the equal protection of the laws in that a stranger to the stream, or another riparian proprietor, may initiate, by appropriation, a prior right to the use of the water than that acquired by the petitioner at the issuance of its patent, years previous to the enactment.

The construction as placed upon the act by the appellate court would further deny petitioner the equal protection of the laws in permitting respondent Cement Company, by the deepening of the river channel, to draw from petitioner's lands practically all of the water of the stream, (a right which it did not have before), and with no other right than the exparte permits of the State Engineer allowing it an appropriation "subject to existing rights." As well might the State Engineer give to the Cement Company the right to enter upon petitioner's land and construct the diversion works, which privilege the Appellate Court has already denied the Cement Company in the former case between the parties. (35 Fed. 2nd, 317).

The injunction in the decree in that case is alleged and pled in paragraph V of the Bill of Complaint, (R. 7-8) and admitted in the answer at its paragraph VI, (R. 23).

At the times at which the patents issued to the lands

of the respective parties, such patents carried with them the riparian rights in the waters of the stream on which they bordered. The then owners of these lands had exactly the same rights in the stream, viz: The common law riparian rights then applicable in Oregon. In this case the rights of both parties were affected by the McClure right to its extent of the 75 second-feet. This right has a priority of 1879.

In 1889, just prior to the enactment of the Water Code, the City's 220 second-feet of water was appropriated by Oregon Water & Power Company, the predecessor of respondent City.

Hence at the time of the passage of the Water Code the proprietor of the respondents' land had begun to use the waters of the stream as an appropriator. Under the terms of the Water Code this right was preserved with its priority.

So that when the Water Code was passed, the owner of the petitioner's land held unimpaired the riparian rights belonging thereto.

But the proprietor of the City's lands has continued under the doctrine of appropriation, resulting in the application for the permits in question, and the efforts to seize and appropriate practically all of the waters of the stream thereunder.

By the construction of the Code in the Hood River case, as applied in the Appellate Court, petitioner's riparian rights were confiscated, because the water had

not been applied beneficially. As so construed, the respondent Cement Company, claiming appropriations made under the Code, is now allowed to deprive the petitioner of its riparian rights to the use of its portion of the waters of the stream. Had the respondents, at the time of the Act, been engaged in constructing works for the use of the water as a riparian proprietor, they would have been allowed under that construction of the Act to have completed their works, and so as a riparian proprietor have taken all of the waters of the stream from petitioner. But as the respondent Cement Company, in the possession of the permits in question, insists on its right under its permits to take practically all of the waters of the stream from petitioner (under the construction of the Code as adopted herein), petitioner has been by the state, in the enactment of the Water Code, as the same is construed by the highest court of said state, denied the equal protection of the laws. The Act, as construed, gives to any appropriator, including the Cement Company, the right to appropriate and take all of the water covered by petitioner's riparian rights. As so construed, the water is taken from the petitioner and transferred to the Cement Company.

NOR SHALL ANY STATE * * * DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

This petitioner, a corporation, is a person within the meaning of the foregoing provision, as has been many times determined in this court. It has also been so held in the State Court.

Minneapolis & St. L. Ry. Co. v. Beckwith,
129 U. S. 26-36;
32 Law Ed. 585.

Portland Light & Power Co. vs. Realty Commission, 56 Ore. 468, at 485;
(105 Pac. 709;
109 Pac. 273) (1910)

As is well known this "Equality Clause" was inserted into the Constitution for the protection of the negroes, then recently liberated from slavery. Consequently the earlier cases under it had to do with the personal rights of individuals. Gradually this was extended to include laws affecting property. And so now it applies to the protection of both the person and the property. The "Equal Protection of the Laws Clause" is now capable of being applied to every variety of cases that may arise. This court, however, seems carefully to consider the application of the provision in each particular case for the preservation of the rights of the individual and his property.

The observations of Freund made in 1904 are of interest:

Freund Police Power,
Section 610, page 631:

"§ 610. Equality and equal protection of the laws. —In the thirty years that have passed since the de-

cision on the Slaughter House Cases the equality provision of the Fourteenth Amendment has, however, assumed an entirely different aspect. The principle of equality is relied upon more and more to check the exercise of governmental powers, and the controlling jurisdiction of the federal supreme court is invoked with increasing frequency to give it effect.

The precise meaning of the clause in question has, however, not yet been defined. The words are 'nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws.' The equal protection of the laws does certainly not mean equal participation in government, and its primary meaning is simply equal security in person and property."

In a tax case in 1874 this court used the following language in

Savings and Loan Assoc. v. Topeka,
87 U. S. 655-670; 22 L. ed. 455 (1874).

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer he his, but should henceforth be the property of B. *Whiting v. Fond du Lac,* 25

Wis. 188; Cooley, Const. Lim., 129, 175, 487; Dill Mun. Cor., sec. 587. * * * *

> To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises, and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

In 1879 in a case from which we are about to quote, this court was dealing with the petition of one of the colored race, who charged the County Judge of one of the counties of Virginia, an officer charged by law with the selection of jurors, with excluding those jurors of petitioner's race. The case has interest here in the discussion of the wide scope of the application of the provision of the Amendment.

Ex Parte, Commonwealth of Virginia,
100 U. S. 339-370; 25 L. ed. 676, 679. (1879)

> "Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

In 1894 this court considered a suit to restrain the enforcement by state officers of unjust and unreasonable rates fixed by state authorities under a state act,

the rates being with reference to freight and passenger service of the carrier. The case has been many times cited in this court.

Reagan v. Farmers Loan & Trust Co.,
154 U. S. 362, 399;
38 L. ed. 1014, 1024 (1894).

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In

Cotting v. Godard,
183 U. S. 79,
46 Law. ed. 92,

decided here in 1901, this court passed upon an act of the State of Kansas limiting the amount of charges to

be made by a stock yards company, without limiting the charges to be made by any other similar corporations doing a similar amount of business, and without reference to the character or value of the services rendered. Although the statute was general in its terms, it was made applicable to any corporation doing business of a designated volume. The statute made a positive and direct discrimination between persons engaged in the same class of business, and based the discrimination entirely upon the quantity of business done by each.

This court quoted from *Reagan vs. Farmers Loan & T. Co., supra.* It also made a quotation from the Railroad Commission cases in the language quoted below.

> "In Railroad Commission Cases (p. 331, L. ed. p. 644, Sup. Ct. Rep. p. 345):
>
> 'From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law'."

The case cites cases in this court applying the "Equal Protection of the Laws Clause" of the Amendment to a very great variety of cases. It made the following quotation from a case decided here in 1886, passing upon a state law imposing an attorney's fee upon railroad cor-

porations omitting to pay certain claims made against them, within a certain time after their presentation, and which statute applied to no other corporations or individuals. The statute was held unconstitutional as denying to the corporation the equal protection of the laws.

The quotation follows:

> "'In *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255, 258, in which was presented solely the question of classification, we said, referring to many cases, both state and national:
>
> 'But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins,* 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1071: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'"

In 1927 this court decided *Louisville Gas & Electric vs. Coleman,* cited below, a case testing the constitutionality of a state statute excepting from a tax upon recorded mortgages, those instruments in which the indebtedness matured within five years. The law was general as to the taxation of mortgages of record, but made the exception as to those maturing within a five-

year period. While this court held the statute valid, it did express the law applicable under the "Equal Protection Clause." It held that the "Equal Protection Clause" means that the rights of all persons must rest upon the rule under similar circumstances.

In the Water Code, as construed, the rights of appropriators were preserved. The rights of riparian proprietors who had not used the same were "abrogated." Rights were given to others similarly situated to acquire through the State Engineer's permits all of the water of the riparian proprietor who had not at the time of the enactment put the waters to a beneficial use. As the emergency clause was attached to the Act in the closing hours of the Legislature, the law became effective immediately when filed with the Secretary. The law contains no provision saving to the riparian owner any vestige of his riparian rights. Such a riparian proprietor could do nothing but stand upon the constitutional right that had vested at the time the government patented the title to his land.

As construed the law granted to any other user on the stream similarly situated to the petitioner, the right to take the petitioner's vested rights to the use of the waters of Rogue River, and thereafter forever debar him from the use thereof, taking from his land without compensation or notice, the principal value thereof.

Of the "Equal Protection Clause" Mr. Justice Sutherland in

Louisville Gas & E. Co. vs. Coleman,
277 U. S. 32, 37,
72 Law. Ed. 770, 773-4, (1927),

said:

"The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky R. Tax Cases,* 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; *Magoun v. Illinois Trust & Sav. Bank,* 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *Santa Clara County v. Southern P. R. Co.* 9 *Sawy.* 165, 18 Fed. 385, 388-399; *Re Railroad Tax Cases,* 8 Sawy. 238, 13 Fed. 722, 733."

A state law may be fair on its face and impartial in appearance, yet it may be so construed and administered as to make an unjust and illegal discrimination between persons of similar circumstances, and amount to a denial of equal justice within the prohibition of The Constitution.

The 1909 Water Code professed through its title to be an Act providing a system for the regulation, control, distribution, use and right to the use of water, and

for the determination of existing rights thereto. It is from the title that we learn in the first instance the purpose of the Act. So its purpose is to regulate and control the disposition and use of water; also to determine the existing rights. In it there is no intimation of an intention to destroy the riparian right which commanded and controlled most of the waters of populated sections of the state. Had it been the intention to do so, a few words would have clearly expressed that intention. In the Act there is not a word concerning the regulation, control, disposition, use and right to the use of any waters controlled by the riparian rights of those whose lands bordered upon the non-navigable streams. The title is innocent of any expressed purpose to impair, to say nothing of "abrogate," existing riparian rights.

Section 1 allows appropriations of water to be made as in the Act provided, subject to existing rights "*and not otherwise.*" It expressly provides that nothing therein contained shall be so construed as to take away or impair the vested right of any person, firm, etc.

The succeeding paragraphs provide for a Board of Control, for a system for determining existing rights, for making appropriations, etc. And then we come to Section 70, with its eight subdivisions. Number 1, renews the pledge that nothing in the Act shall impair the vested right of any person, association, etc.

And Subdivision 2 provides that the application of

water to a beneficial use prior to the passage of the Act by a riparian proprietor

> "shall be deemed to create in such riparian proprietor a vested right"

to the extent of his use, etc.

In all these provisions the Code is innocent of any wrong to be perpetrated upon the riparian proprietor in the position in which the owner of petitioner's lands was at the time of the enactment.

The state proceeded along with a few adjudications until six years had passed. A suit was on its way to this court to determine whether or not the Act would impair vested riparian rights. In the Bill of Complaint in that suit thousands of acres of riparian lands were described. Just before the hearing in that case in this court, the Oregon court decided In Re Willow Creek. In passing upon this identical question, it assured the world that the Act was innocent of any threat to the vested riparian holder; it quoted Section 1 of the Act and Subdivision 1 of Section 70, as an assurance that the administration of the Act would not violate vested rights. And as a further assurance to this court, it quoted controlling authorities in the Oregon court, and in the Appellate court, to the effect that the riparian common law doctrine was too firmly established in Oregon to be now "shaken" by decree or legislation; that both the riparian doctrine and the doctrine of appropriation could exist in the same community. Mean-

ing to say to the world and to this court that the Act permitted the administration of the rights of both classes,—riparian—appropriation. And so this court accepted the assurances and definitely determined that it was not the intention of the Legislature to impair vested rights, such as petitioner's. Throughout the administration of the Act, however, the adjudication proceedings show that there was a disposition to crowd out riparian claims and to treat them as appropriations.

Finally, in 1926, in the Hood River case, the court for the first time made the announcement that the riparian doctrine of continuous flow would take the heart out of the Water Code.

In all this there was no suggestion that the court overruled its decision in the Willow Creek case, nor that it found it necessary to use the so-called police power to destroy the vested riparian rights.

At page 174 of the Hood River case, it is stated that by the Water Code the legislature

> "in its wisdom, saw fit to define what shall be deemed to constitute a vested right in a riparian proprietor."

Of course, it did not declare anything of the kind. It simply said that a beneficial use should be deemed to create in the riparian user a vested right. There was no language to exclude the vested right of your petitioner, nor of any other riparian owner. The language simply meant that he who had used it for a particular purpose

had a priority and the vested right to continued the use thus begun. Not even by interpretation can one fairly read into the language the "abrogation" of the common law right.

Whether intentionally or not—let us assume innocently—the writer of the two opinions, Re Willow Creek, Re Hood River, turned about face. In the first, such rights as petitioner's were preserved. In the second, they were destroyed. The vice, therefore, is in the application and administration by public authority so as to practically make unjust and illegal discriminations between persons in similar circumstances, and in violation of the "Equal Protection of the Laws Clause."

We make an apt quotation from the opinion of this court, rendered in 1885, in

Yick Wo v. Hopkins,
118 U. S. 356-374;
30 Law Ed. 220-228

Quotation from the Law Ed. at 227:

> "In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities

charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor, etc.* of New York, 92 U. S. 259 (Bk. 23 L. ed. 543); *Chy Luny v. Freeman,* 92 U. S. 275 (Bk. 23, L. ed. 550); Ex Parte Va. 100 U. S. 339 (Bk. 25 L. ed. 676); *Neal v. Delaware,* 103 U. S. 370 (Bk. 26 L. ed. 267), and *Soon Hing v. Crowley* (supra)."

Here, from the history of the Act, and of the administration of the Act and the methods used to arrive at particular conclusions, it seems there has been a constant effort to so administer the Act as to strangle by adjudication decrees the riparian rights existing on all non-navigable streams.

To illustrate see

In Re Sucker Creek,
83 Ore. 228,
(163 Pac. 430) (1917).

In that case the Oregon court decreed Mrs. Leonard's riparian rights as waived because she had, throughout

the proceedings, claimed the right to irrigate a definite number of acres, and with a definite amount of water through ditches. A quotation is made from the opinion in that case at Appendix 67. In the portion of the opinion quoted, it is also stated that an appropriation comes through active steps taken, while the riparian "*accompanies the ownership of riparian lands.*" And this in the year 1917, between the dates of the Willow Creek and the Hood River decisions.

So, too, in the most recent case, the Deschutes case (cited), the court insisted positively on forcing the Deschutes Company into the position of an appropriator. This practice can be followed through most of the adjudications in the Oregon Reports. So that the inequality is in the construction and also in the application of the Act.

But after every such judicial effort there seems to again come a decision from the same court reaffirming the right that will not down.

The doctrine of the Oregon Court construing the "Equal Protection of the Laws Clause" of Section 1 of the 14th Amendment. Construing this clause of the Amendment, it is the doctrine of the Oregon Court that a statute to be valid, which contains a classification of persons or things, for the purpose of legislation, must make such classification as will be a rea-

sonable one and based on real distinctions in the subject matter, which bear some relation to the objects sought to be accomplished by the statute.

We cite:

Oregon Tunnel District No. 1 v. Moore et al,
120 Ore. 594,
253 Pac. 1 (1927).

This was on appeal to the Supreme Court of Oregon from a decree holding Chapter 319 of the Laws of 1921, an Act providing for the formation of Tunnel Districts, as violative of Section 1 of the 14th Amendment, and of the Oregon Constitution, etc. The Act divided all owners of taxable real property within the district into two classes, those owning land of more than 5000 feet in area, and those owning less, in the other class.

The quotation here made further explains the facts.

(Quotation from the Oregon Report, 598-9):

"2. It will thus be seen, that under the provisions of this act all owners of taxable real property within the district are divided into two classes; those owning land of 5,000 feet or more in area, and those owning land of a less area, and that the classification has no real or substantial relation to the objects and purposes of the act. It is not within the legislative power of the state to make a classification which confers upon one class, privileges and immunities which are denied to another class, unless the classification is a reasonable one and is based upon some real and substantial distinction between the two.

The purpose of this act is to create a local improvement territory and to spread the burden of paying for the improvement by levying an ad valorem tax upon the property benefited, which under this act consists only of the real property within the district. The amount of the tax, which under the act may be levied against the real property of the various land owners of the district, is not to be determined by the area of the land held by them, but is to be determined solely by the assessed valuation of the land appearing on the assessment roll of the county. Under these circumstances, the area of the land upon which the tax is to be levied cannot in any way affect the burden imposed, and therefore this classification based on area alone can have no reasonable relation to the object sought to be accomplished by the act. If the tax to be imposed was to be based upon area and not upon value, there would be a reasonable relation between the area and the object of the legislation, but since value and not area determines the amount of the tax which is to be imposed against the land owners within the district, any classification which disregards value and is based on area alone, and gives to one owning more land but of less value any right, privilege or immunity which is denied to another owning less land, but of greater value, denies to the latter the protection of *equal laws* and violates both the state and federal Constitutions. The classification contained in this act is purely arbitrary and creates discriminations not based upon any real or substantial differences or distinctions. In order that a statute be valid which contains a classification of persons or things for the purpose of legislation, such classification must be a reasonable one and must be based on real distinctions in the subject matter which [illegible] some relation to the objects sought to be accomplished by the statute: 12 C. J. pp. 1148, 1149."

If by *construction* of Subdivision 2 of Section 70 of the Water Code, it is to be held as follows:

(1) That the riparian rights of the riparian proprietor which had been beneficially used prior to the enactment of the Code are preserved to the extent of the actual application to beneficial use, with the right to complete any works begun prior to the enactment, but that,

(2) The riparian rights of the riparian proprietor who had *not*, prior to the enactment of the Code applied the water to a beneficial use *are "abrogated,"* R. 450, F. 569, and that,

(3) As to those in class number 2, *his* water may be appropriated under Section 1 of the Code, *freed* from his prior rights as a riparian proprietor,

There exists a classification which makes a discrimination, violative of the "Equal Clause" provision. And more particularly in this:

That such a classification destroys the vested right which had not been used prior to the enactment, and grants the privilege to the riparian classified under number 1, *to take all* of the water from the riparian described in number 2, and grants to the stranger to the stream, or to another riparian proprietor thereon, the right to appropriate the waters, in the use of which, the proprietor in class number 2, *had a right that vested at the issuance of his patent*, and prior to the enactment of the Code.

If, as stated in Re Willow Creek, in 74 Ore. at 610, that by the Code

> "the state, being interested in providing a system for the regulation of the use of the water and for the determination of existing rights thereby exercised the police power of the state in order to provide a complete system of state *control*, in the *regulation of the diversion and use* of the water, *and a means for having a record made* of the rights to the same, for much the same purpose as records of title to real estate are provided,"

then the classification made, as the act is construed, has *no relation whatever to the purposes* of the Act.

Again, at pages 613-14 of the Willow Creek case, language was used which was cited by this court in *Pacific Livestock vs. Lewis, supra*, to the effect that the Act was

> "To accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies,"

and to provide a convenient way for adjustment and recording of the rights.

None of these purposes as so stated have the slightest relation to the confiscation of the water, the right to the use of which, belonged at the time of the enactment, to the riparian owner whose lands had been patented, *prior* thereto.

If it be argued that the purpose is to obtain more water for these purposes, then the classification is the more discriminatory in the taking of the property of

one, and transferring it by legislative act to another, who had no color of title or right thereto.

We call the court's attention also to

United States Automobile Service Club vs. Van Winkle, Attorney General,
128 Ore. 274,
(274 Pac. 308) (1929)

This decision decided the constitutionality of Section 4 of Chapter 419 of the Oregon Laws of 1927, page 590, (Section 4 being at page 593).

The Act was entitled one to define motor club service, and to define, license and regulate companies engaged in selling, furnishing or procuring the same for consideration, to owners and operators of motor vehicles, and providing a penalty.

Section 3 provided for the issuance of licenses by the Commissioner (defined to be the Insurance Commissioner) and the Act forbade transacting business without such license.

Section 4, among other things, provided that no license should be granted except to one who had proved to the Commissioner that it had been in continuous, active operation in the state for a period of *five years,* immediately preceding the enactment, and had a paid membership of more than 5,000 members, etc., and herein lies the discriminatory classification.

The opinion by Mr. Justice Rand stated that it was contended by plaintiff that the Act violated the 14th

Amendment to the Federal Constitution, among other things, in that it

> "denies to plaintiff the equal protection of the laws and also grants to others in the same pursuit and under like conditions, privileges and immunities not conferred upon plaintiff,"

specifying the discriminations, supra.

The decision holds that if any substantial distinction exists between the two classes of corporations, then the question of classification based upon the difference, would be one for the legislature to decide, and that the decision would be conclusive upon the courts

> "*if* it were a reasonable and not arbitrary classification, even though burdens were imposed upon one class which were not imposed upon the other."

The case quotes from the Oregon Tunnel case, supra, that the classification must be a reasonable one, based on real distinctions in the subject matter *which bear some relation to the object sought to be accomplished by the statute.*

It was contended that notwithstanding this, it was within the *police power* to so classify, and the statute should be upheld on any ground which "might" have seemed plausible to the Legislature, even though there was no reasonable ground for the discrimination provided in the Act. It held that while the police power is very broad, the Legislature is not the final judge upon that question, citing

Union Fisherman's Co. v. Shoemaker,
98 Ore., 659,
(193 Pac. 476;
194 Pac. 854).

We quote from 128 Ore. at 284:

> "The classification provided for by Section 4 of the act is not founded upon any substantial difference between the two classes provided for. *It denies to plaintiff the equal protection of the laws* by imposing upon plaintiff a burden which is not imposed upon one of plaintiff's competitors, which is engaged in the same pursuit at the same time and under like circumstances and, therefore, violates the Fourteenth Amendment of the federal Constitution."

It will be noted that the Tunnel case and the Automobile Club case, supra, were both decided subsequent to the decision in the Hood River case.

This case will be further cited under the title of "Police Power."

ADDITIONAL AUTHORITIES SUPPORTING POINT 2 AND POINT 3, THAT SUCH VESTED RIGHTS ARE UNDER THE PROTECTION OF SECTION 1 OF THE 14th AMENDMENT TO THE FEDERAL CONSTITUTION.

Pumpelly v. Green Bay Company,
80 U. S. 166, 177-179; 20 L. ed. 557.

Missouri Pac. Ry. Co. v. Nebraska,
164 U. S. 403; 41 L. ed. 489.

Chicago B. & Q. R. Co. v. Chicago,
166 U. S. 226; 41 L. ed. 979.

Houston & Texas Central Ry. v. Texas,
170 U. S. 243, 261; 42 L. ed. 1023.

Lake Shore & M. S. Ry. Co. v. Smith,
173 U. S. 684; 43 L. ed. 858.

Muhlker v. N. Y. Ry. Co.,
197 U. S. 544, 570; 49 L. ed. 872.

Cleveland Elec. R. Co. v. Cleveland, 204 U. S. 116;
51 L ed. 399.

Chicago M. & St. P. R. Co. v. Wisconsin,
238 U. S. 491; 59 L. ed. 1423.

Buchanan v. Warley, 245 U. S. 60, 74-82;
62 L. ed. 149.

Forbes Pioneer Boat Line v. Board of Coms'rs,
258 U. S. 338, 341; 66 L. ed. 647.

Pennsylvania Coal Co. v. Mahon,
260 U. S. 393, 412-416; 67 L. ed. 322.

Pierce Society of Sisters of the Holy Names,
268 U. S. 510, 533-536; 69 L. ed. 1070.

Lockner v. New York, 198 U. S. 45-76;
49 Law ed. 937;

Coppage v. Kansas, 236 U. S. 1-42; 59 Law ed. 441.

CHAPTER IV.

Section 4 of Article XI of the Oregon Constitution, quoted below, in this chapter, provides that no property may be taken by a corporation without compensation.

There is only one case in the Oregon court that has given consideration directly to that constitutional provision as applied to the riparian right, viz,—*Logan vs. Spaulding, supra.* And so we maintain that the case was controlling in the Court of Appeals. We discuss the subject under the following title:

(5) THE OREGON WATER CODE, AS CONSTRUED IN RE WATERS OF HOOD RIVER, WHICH CONSTRUCTION WAS ADOPTED IN THE APPELLATE COURT, VIOLATES SECTION 4 OF ARTICLE XI OF THE OREGON CONSTITUTION, AS CONSTRUED IN THE OREGON COURT IN LOGAN VS. SPAULDING LOGGING CO., (CITED BELOW), WHICH DECISION SHOULD HAVE BEEN FOLLOWED IN THE APPELLATE COURT.

Section 4 of Article XI of the Oregon Constitution follows:

> "§ 4 Compensation for Property Taken by Corporation. No person's property shall be taken by any corporation, under authority of law, without compensation being first made or secured in such manner as may be prescribed by law."

Logan v. Spaulding Logging Co. 100 Or. 731, 736, (190 Pac. 349), supra,

construed an Oregon Act granting franchises for using Oregon streams for log floating purposes as violative of said Section 4, Article XI, in that it impaired the vested right of the riparian proprietor on the stream affected.

It held that

> "interference with the natural flow of the stream, in so far as it injures the riparian proprietor, or interferes with his enjoyment of his right to the use of the stream, is a taking pro tanto of his property, which is governed by the constitutional provision above quoted."

CHAPTER V.

(6) OREGON WATER CODE OF 1909.

A copy of this Code consisting of its 74 sections is set forth in full at Appendix, pages 1 to 33.

So far as these provisions affect the main questions here, we are concerned with but Section 1, and Section 70, (with its eight subdivisions, pages 29-31), Section 72, providing for the exercise of the power of eminent domain, and Section 74, the Emergency Clause, designed to prevent the Act from being referred to the people under the referendum powers of the state Constitution.

In addition to these sections, there are those which provide a procedure for the adjudication of those water rights of the state *subject* to adjudication under the Code. But those provisions affect only side issues.

Section 1 provides in effect:

That subject to existing rights all waters of the state may be appropriated for beneficial use as therein provided; but that nothing therein contained shall be construed to take away or impair the vested right of any person, firm or corporation or association to any water.

Section 70 (Appx. 29), by its Subdivision 1 reiterates that nothing in the Act contained shall impair vested rights of any person, etc., and Subdivision 2 thereof, that actual application of water to a beneficial use prior to the passage of the Act by any riparian pro-

prietor shall be deemed to create in him a vested right to the extent of beneficial use, etc.

Complete Copy of Section 1, and of Section 70, Water Code

At this place it seems that it would be to the convenience of the court to set forth here Section 1, (Appx. 1) and Section 70 (Appx. 29-31) of the Water Code.

Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water.

Section 70. Vested Rights Preserved.—

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control,

in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns, shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of any appropriator, or user of water under an appropriation of water made prior to the passage of this act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial pur-

pose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

CHAPTER VI.

The question before the court is:

(7) TO WHAT EXTENT, IF ANY, HAS THE WATER CODE AFFECTED PETITIONER'S RIPARIAN RIGHTS?

Petitioner maintains that properly construed the act has not changed or impaired these rights in the least.

But that, as construed in the decree under review here, petitioner's vested rights have been destroyed without due process of law; that they have been taken without compensation, and delivered to the respondent Cement Company, which seeks to use the same for the purposes for which the petitioner acquired them, namely: The manufacture of electrical power by the use of the waters of said stream, where it flows over and along petitioner's said lands. That the principal value in said lands arises from the natural fall of the waters of said stream thereon; that they are ideally situated for the manufacture of sufficient power to stabilize the petitioner's service of electricity alike to all consumers within the territory served. That the use of the power which nature made so easily available upon petitioner's said lands, was an inducement for the purchase and holding of said lands in connection with petitioner's lawful business as a public utility.

After the passage of the Water Code in 1909 various proceedings were instituted under the Code for the adjudication of the relative rights to the use of waters of Oregon streams. Naturally, the question arose, to what extent were vested riparian rights affected by the Code provisions?

So that in 1915, six years after the Code became effective, the Willow Creek case was decided in the Oregon court, and the Pacific Livestock case decided in this court, and based upon the Willow Creek case.

These cases so strongly established that such riparian rights as petitioner possesses were unaffected by the Code, that the fears of riparian proprietors were put at rest.

On June 15, 1920, the Oregon court decided *Logan vs. Spaulding Logging Company, supra,* (petition for rehearing, denied Feb. 15, 1921), to the effect that the common law riparian rights on the non-navigable streams in Oregon were property under the protection of Section 4 of Article XI of the Oregon Constitution, providing that property could not be taken except upon just compensation paid. And it was after that decision that petitioner acquired its lands for these power purposes.

And yet today we find ourselves here defending against a construction placed by the Appellate Court upon Subdivision 2 of Section 70 of the Code, which "abrogates" petitioner's vested rights. And this con-

struction, and the decree based thereon, is believed to have been taken from the Hood River case, which we have pointed out at pages 32-38, herein (Statement of The Case), is not applicable to the case at bar.

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The opinion of Mr. Justice Brown, specially concurring in the dissenting opinion of Mr. Justice McCourt, from ..... 256 to 259

We will set forth the references to the Pacific Livestock case, and to these Oregon cases under the following title:

CHAPTER VII.

(8) THE VARIOUS CONSTRUCTIONS PUT UPON THE PROVISIONS OF THE WATER CODE BY THE OREGON COURT AND BY THIS COURT.

We deal here with the following cases:

In Re Willow Creek, (1915)
74 Ore. 592,
(144 Pac. 505; 146 Pac. 475)

Pacific Livestock Co. vs. Lewis, (1915)
241 U. S. 440, 60 Law Ed. 1084

Re Water Rights of Hood River, (1924)
114 Or. 112;
(227 Pac. 1065)

Norwood v. Eastern Oregon Land Company,
(1924) 112 Ore. 106,
227 Pac. 1111

Logan v. Spaulding Logging Co., (1920)
100 Ore. 731, 736,
190 Pac. 349

Harris v. Southeast Portland Lumber Co., (1927)
123 Ore. 549;
262 Pac. 243.

The first two of these cases, (In Re Willow Creek), was decided in 1915, just prior to the consideration by this court of the second of the cases, (*Pacific Livestock Co. vs. Lewis*).

In both cases the constitutionality of the Act was assailed. The first, Re Willow Creek, was an ad-

judication proceeding under the Code. The respective rights of the water users concerned in that case had been determined by the State Water Board; and its Findings and Order of Determination of the respective rights had been filed in the Circuit Court, passed upon, and the decree appealed to the Supreme Court. The Oregon court on the appeal sustained the constitutionality of the Act.

We make the following quotations from the Willow Creek case, the first in determining the constitutionality of the Act. The other portions quoted are in confirmation of the common law riparian doctrine. The citation from paragraph 24 of the opinion gives the assurance that when such rights have become *vested* they cannot be taken away by legislative enactment or judicial decree.

WILLOW CREEK

6, 7. "It is claimed, also, that the act is in contravention of the constitutional provision that no person shall be deprived of his property without due process of law. This indispensable constitutional safeguard should be carefully applied and never infringed upon. If any clause of the act in question is not in consonance therewith, its effect should be eliminated, or else it should, if consistent, be given an application in conformity with the letter and spirit of the organic law. The first section of the act declares that nothing therein contained shall be so construed as to take away or impair the vested right of anyone to any water; and Section 70, subdivision 1, is to the same effect. Any appropriation of water under the provisions of the act is thereby made subject to such condi-

tion. In the absence of such legislative announcement the lawmakers have no power to destroy such a right. The main purpose of the law is to protect water rights and to promote the utilization of the same. The right to the use of water is a valuable property right guaranteed to every citizen. It cannot be arbitrarily nor unreasonably interfered with by the legislative department of the state." (Opinion 616-7) * * * * *

21. "It is said by Mr. Judge Bean, in the case of *Eastern Oregon L. Co. v. Willow River Land & Irr. Co.*, decided by the Circuit Court of the United States for the District of Oregon, November 10, 1910, 187 Fed. 466:

'The general doctrine of riparian rights is too firmly established in this state to be shaken now by judicial decision. It is useless to cite authorities. The riparian proprietor is entitled to the ordinary * * flow of a stream as long as it is of any beneficial use to him, and this may, under some circumstances, include flood or overflow waters * * to be anticipated during ordinary seasons.'" (Opinion 625)

* * * * *

22. "The nature and extent of the right of a riparian proprietor to the water of a stream for irrigation cannot be measured by any definite or fixed rule, nor can the amount of water which he is entitled to use for that purpose ordinarily be definitely determined; it being necessarily a varying quantity, depending upon the use by other proprietors, and whether its use by him will be an injury to them. The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality. A settler on a non-navigable stream has the election either to rely upon his rights as riparian proprietor or to make an appropriation of the water and claim as an appropriator, but he cannot do both; *Williams v. Atlnow*, 51 Or. 277, 300 (95 Pac. 200, 97 Pac. 539); *Crawford v. Hathaway*, 60 Neb. 754 (84

N. W. 271); *Crawford v. Hathaway,* 61 Neb. 317 (85 N. W. 303); *Crawford v. Hathaway,* 67 Neb. 325 (93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889)."

* * * * *

24. "In the arid and semi-arid lands of the west the early home-builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for a beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws then prevailing and defining the appurtenances thereto. When such rights have become vested, they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation." (Opinion 627).

As will be seen from the quotation, the Oregon court contented itself with the discussion of Section 1 of the Act and Subdivision 1 of Section 70 of the Act. We have discussed each of those here, and which provide:

That nothing contained in the Act shall take away or impair the vested right of any person, firm, or corporation or association to any water.

The only difference in the language of Section 1 and of Subdivision 1 of Section 70, is as has been pointed out:

That Section 1 of the Act states that nothing in the act contained shall be construed to take away or impair these rights, while the other says that

"nothing in this Act contained shall impair the vested right of any person," etc. Appx. 29.

This opinion was by Mr. Justice Henry Bean.

We next consider the decision of this court in *Pacific Livestock vs. Lewis.* This suit was brought by bill in equity in the District Court of Oregon. Among the questions raised, was, whether the Act was repugnant to the 14th Amendment of the Federal Constitution. In that case this court made a careful examination of the provisions of the Act, taking the material provisions step by step. It quoted from the Willow Creek case at page 448-9 of the U. S. Report, to this effect:

That the statute had been enacted to accelerate the development of the state, promote peace and good order, minimize the dangers from vexatious controversies, and afford a convenient way for the adjustment and recording of water rights. And that in its enactment it called "to a limited extent" into requisition, the police power of the state. From that opinion it took this language:

> " 'Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public.' "

Upon a careful consideration of the Act this Court said:

"That the statute is not intended to take away or impair any vested right to any water or to its use is expressly declared in its 1st and 70th sections, 3 Lord's Oregon Laws, §§ 6594, 6595."

Section 6594, 3 Lord's Oregon Laws, there cited, corresponds to the present Section 47-402 Oregon Code Annotated 1930, and to § 1 Appx. page 1. Section 6595, 3 Lord's Oregon Laws is Section 47-403 of said Oregon Code 1930, Subdivision 1 of § 70, Appx. 29.

Both courts cited Section 1 and Subdivision 1 of Section 70, as expressing the *intention of the Legislature not to impair any vested right.*

This Court also had before it the express statement of the Oregon Court that common law riparian rights and rights by appropriation were not so antagonistic that they might not both exist in the same locality, and that a settler had a right to acquire his water rights by either method.

And there is also set forth in these quotations from the Oregon Court, the statement that when such rights have been vested they cannot be taken away by legislative act nor by judicial decree. (Par. 24, page 627).

In both opinions these assurances were, of course, accepted by this Court as having been made in good faith, and under the belief that the Oregon Court would abide thereby, in its administration of the Act. Nothing was said in the Willow Creek case to give the slightest intimation that the Act had "abrogated" those vested rights that had not been put to a beneficial use prior

to the enactment of the Code. Nor was there anything which gave notice that such a construction would subsequently be placed upon the Act, under the guise of the exercise of the police power. The Oregon court had said that both riparian rights and rights by appropriation could exist in the same locality, and that the settler had the right to make his choice between the methods of acquiring the right to use the water.

In Re the Waters of Hood River.

This is a decision by the same distinguished jurist who rendered the opinion in the Willow Creek Case.

In the Hood River case the court held that the power company claiming as a riparian owner had no water right,—at least had no riparian rights, because they had not been put to a beneficial use before the enactment of the Water Code.

And this is the method of reasoning by which that result was reached.

At page 181 of the opinion it is said:

That it was within the province of the Legislature, by the Act of 1909, to define a "vested right" of a riparian owner, or to establish a rule as to when and under what conditions and to what extent, a vested right should be deemed to be created in a riparian proprietor,—a most remarkable doctrine. The Legislature judicially determines when and under what conditions, and to what extent a vested right should be deemed to be created in a riparian proprietor. The language "deemed to be

created" was doubtless from Subdivision 2, Section 70 of the Code. That was at page 181 of the opinion. At the following page, 182, it is said:

That under our present statute DEFINING what shall constitute a vested right of a riparian proprietor, the claim of the power company as a riparian owner of land on Hood River, to a continuous flow of a specified quantity of water over its land, cannot be maintained. This was placing the decision upon a definition—again a legislative invasion of the province of the judiciary. But the language does not comport with the result in that case, which was that the company's riparian rights were destroyed. It was not even granted riparian rights which had been acquired prior to March 3rd, 1877, the date of the enactment of the Desert Land Act. It is this opinion that the Appellate Court followed in its construction of Subdivision 2 of Section 70 of the Code.

THE NORWOOD CASE

This case is said in the majority opinion in the instant case to have been decided upon the same day as the decision was rendered in the Hood River case. They were both decided in 1924. Mr. Justice Bean, who wrote the opinion in the Hood River case, filed an opinion concurring in part and dissenting in part, (112 Ore. 119). In this opinion he there said:

"The question of riparian rights is fully discussed in the several opinions

In Re Hood River,
227 Pacific, 1065, (note the page)

and it is unnecessary to further comment thereon." (The Pacific Reporter Reference for the Norwood case is 227 Pacific, 1111). So the publications of the opinions would seem to have been first, Hood River, and then, Norwood. But at any rate they were both under consideration before the same court at the same time.

In the Norwood case, page 111, the opinion states:

That the *riparian rights* of defendant company date back to 1867, when its predecessors in title acquired the ownership of the land.

At page 114 quotation is made from *Brown vs. Baker,* (cited here) to the effect that riparian rights are purely local, inseparably annexed to the land washed by the stream at the place where they border on its waters.

> "Such rights cannot be divorced from the adjacent lands."

And further, at page 116:

> "The title of the defendant, therefore, carried with it the common law riparian rights which have always been recognized in this state."

The court, at page 117, quoted from Section 1, and from Section 70, to show that the existing rights were preserved. It said that the Title of the Act so far as existing rights were concerned, limited the operation of the statute to "Determination of existing rights." That thus controlled in the title of the Act, as well as

by the terms thereof, the Legislature *could not and did not add to* or *subtract from* the *scope of existing rights.*

Quotations from this case are set forth at Appendix 71-73.

THE HARRIS CASE (1927).

The Harris case involved the flow of a non-navigable stream, and the effect of the impairment of the riparian rights thereon.

The leading case in Oregon upon that subject is *Weiss vs. Oregon Iron & Steel Co., supra.* We have quoted at length from that case at Appendix 52-6. We likewise quoted from the Harris case at Appendix 74-76.

By comparison it will be seen that the Harris case adopted in toto the common law riparian doctrine, as set forth in the Weiss case. It quoted from the Weiss case that a riparian proprietor is entitled to have the stream which washes his lands flow as it was wont by nature, without diminution or alteration; that every riparian owner of land through which a natural stream of water flows has a right to its uses as it passes his land; that he is entitled to have it flow naturally in its *accustomed* channel, without unreasonable detention or diminution, etc. And that such rights are inseparably annexed to the soil, and are part and parcel thereof; that they exist jure naturae as part of the land, and the rights will not be suspended or destroyed by mere non-

user, although they may be extinguished by adverse possession for the period of prescription.

LOGAN VS. SPAULDING LOGGING CO. (1920)

This case commonly called the "Logan Case" has been heretofore discussed, page 121-2 hereof, under the subject of the violation of the Oregon Constitution, Section 4 of Article XI, which provides that no property shall be taken by any corporation under authority of law without compensation, etc. This case held unconstitutional, a law which permitted the licensing of log floating through private riparian lands in non-navigable streams. The decision was based upon the ground that a riparian right *was vested*, and that any law that impaired it amounted to the taking of property pro tanto, in proportion to the impairment of the right. This is one of the Oregon cases, which we urge the Appellate Court should have followed. It has never been reversed, and is the law of the state today.

We have cited these cases in this order to show:

(1) That the Willow Creek case was considered by this Court in its decision of the Pacific Livestock case. A comparison of the Willow Creek opinion with that of the Hood River case will show that:

In 1915, six years after the adoption of the Code, it had *not been* discovered by the writer of the two opinions that the Legislature had intended to destroy vested riparian rights by Subdivision 2 of Section 70 of the Act. That when that discovery was announced in the

Hood River case, the court was as evenly divided as possible. That at the very time when the Hood River case was being determined, *the Norwood case was announcing the common law riparian doctrine,* for which we contend, and stating that it had always prevailed in Oregon.

February 15, 1921, the Logan case was decided. Between the dates of the decisions of those two cases, two important things happened. First, on February 15th, 1921, there came the decision of the Logan case, holding that the impairment of a riparian right violated Section 4 of Article XI of the Oregon Constitution.

Following that decision, to wit: On March 11th, 1921, petitioner acquired its lands that had been patented in 1885. Hence, at the time of the petitioner's purchase of its lands, the decision of the Willow Creek case, and the decision of this court in the Pacific Livestock case, and the decision of the Oregon court in the Logan case, were certainly controlling as to the character of petitioner's title, namely:

That its riparian rights to Rogue River were vested, and were part and parcel of the land, and under the protection of both the State, and Federal Constitutions.

Then there came the Harris case in 1928, stepping back to the year 1886 to take from the Weiss case, and re-announce the common law riparian doctrine which the Oregon court said in the Norwood case, (at the time

of the decision of the Hood River case), *had always prevailed in Oregon.*

This Court not bound to follow such conflicting decisions.

We realize that the Court would feel bound to follow the Oregon construction of the Water Code. But we know that if by so doing the result would be to take private property without due process of law, the construction of the Oregon Court would not be followed. We also believe that where the recent state decisions are so mixed and conflicting that it may be said the state has no real policy in so holding, the Federal Court can decide the case without decision of the state court. "Such decisions have not the character of established precedent declarative of the settled law of a state."

Pease v. Peck, 59 U. S. 595,
18 How. 595-601,
15 Law Ed. 518, 520. (May 14, 1855).

Illustrative of the wisdom in applying the doctrine of *Pease vs. Peck* is the 1930 decision of the Oregon court in

In Re Waters of Deschutes River,
134 Ore. 623,
286 Pac. 563,
294 Pac. 1049.

This was an adjudication proceedings under the Water Code. There were several claimants who appeal-

ed from the decree of the Circuit Court. Of these the Columbia-Deschutes Power Company was the principal appellant, being most seriously affected by the decree. Its appeal was dismissed here as taken too late, (290 U. S. 590, (1933). Its modified opinion is dated December 30, 1930, 134 Ore. 623.

The Columbia-Deschutes Power Company, (which we will call the Deschutes Company), claimed as a riparian proprietor, the right to use and appropriate 8,000 cubic feet per second of the waters of the Deschutes River for power purposes. (Opinion 691). Its claim was filed January 7th, 1924; the details thereof are at the opinion 685-689. The matter is covered in the opinion by paragraphs 45, 46, pages 703-4. It is there stated that the Deschutes Company had stipulated and waived its right in favor of all claimants and appropriators on the river *above* its proposed location of its power plant.

In the original opinion the Deschutes Company was decreed 8,000 cubic feet per second for power with a priority of January 5, 1924. (The date undoubtedly referring to the date of the filing of the claim).

In that case the opinion quotes the opinion in

Caviness vs. La Grande Irrigation Co.,
60 Ore. 410 at 421,
(119 Pac. 731).

The opinion in the quoted case is by Mr. Justice Burnett, who dissented in the Hood River case, and

was the author of the opinion in the Norwood case.

The quotation is found in the Deschutes case at 692 to this effect:

An appropriator, subject to the rights in existence at the time that his appropriation is made, may take all of the water that he can reasonably use without waste for a beneficial purpose, although it be the lion's share. But a riparian owner using water in that capacity is in a sense always a tenant in common with other riparian owners whose rights, at least for irrigation, he is bound not materially to injure by his riparian use. That the appropriator is always a tenant in severalty owing no duty or respect to those endeavoring to use the water by title subsequent to his. That in the very nature of things the court cannot fix in advance by decree what quantity of water will be reasonable for the future use of a riparian proprietor claiming the duty of water in that character. The Deschutes opinion italicizes this last statement. That concerning mere diversion and use there is no difference between the non-riparian appropriator and the riparian user, provided the former has a lawful access for that purpose to the stream from which the diversion is made.

Again, at 704, the Deschutes opinion states (paragraphs 47, 48), that where the old riparian system prevails, a riparian owner using water in that capacity is in effect always a tenant in common with other riparian owners of the stream, and the amount to

which he is entitled varies with the reasonable demands of the other riparian proprietors.

At paragraph 49, page 706, it is stated:

The statute (Code) recognizes no difference as to the right of water to be used for irrigation, from water to be used for power purposes, in so far as it relates to the protection of such rights. That such uses should be and are protected under the statute.

What now becomes, in the light of this opinion, of the doctrine of the Hood River case, as construed by the Appellate Court to the effect that the riparian proprietor, who had not at the enactment of the Code beneficially used the water, lost his riparian rights?

The Hood River case and the majority opinion in the Appellate Court beg the question and avoid the issue by referring to the riparian right as the doctrine of continuous flow. This, to an extent, clouds the issue, particularly in the instant case, where the right is in effect completely "abrogated."

The majority opinion in this case quoted the Hood River case to the effect that by the terms of the Water Code the riparian proprietor's

> "usufructory privileges were not destroyed; his right of access to and to the equal use of the waters for ordinary domestic purposes were preserved. Re Water Rights of Hood River, 114 Oregon at 190." (R. 449, 73 Fed. (2d) 568).

But the prevailing opinion terminates at page 188. At 190 we find the opinion of Mr. Chief Justice Mc-

Bride, specially concurring, and the reference is doubtless made to this concurring opinion. And the statement has reference to that *portion* of the concurring opinion which deals with the subject of "riparian rights," and *not* with the subject of the Water Code, or its relation thereto. At 190 it is in substance said:

That riparian rights to water may be divided into two classes—natural uses and others deemed extraordinary.

> "Natural uses, which I deem to be those that vest in a riparian proprietor at the very moment that he obtains title to land bordering on a natural stream,"

include water for domestic, home, farm, drinking, washing, cooking, or for stock purposes. They might well be construed to extend to all culinary household purposes, watering of gardens and, as far as irrigation is concerned, watering of small gardens, is about the extent of the use of common law.

At least our interpretation of the concurring opinion does not justify the inference that the 1909 Water Code contains any preservation of any rights whatever to the riparian owner who had not used the water prior to the enactment.

But the trouble comes, when in order to reach a conclusion as in the Hood River case, a court steps beyond the rules of statutory construction, and reads things into the statute particularly helpful to the case. Hence, "bad cases make bad laws." Try as we will, we can

find in the Water Code not a syllable designed to protect the riparian proprietor in satisfying his thirst for a drink, as against the greed of an appropriator who would take it all. The vice comes in the *construction* of the Water Code.

Neither in its title nor in the body of the Act, is there language capable of being interpreted as destroying riparian rights which had not been beneficially used before the Act. The nearest approach to such language is to be found in Subdivision 2 of Section 70, used in the Hood River case, from which to deduce the construction that riparian rights unused at the time of the enactment were "abrogated." That language is in effect, that actual application of water to a beneficial use prior to the enactment, by a riparian owner, *creates* in him a vested right to the extent of the actual beneficial use. Who will read into that language the further statement that the time-honored riparian doctrine was "abrogated" thereby? Who will apply the doctrine of appropriation, which required beneficial use, to the riparian doctrine, which did not require beneficial, or any use, (the riparian right being one which cannot be gained by user nor lost by nonuser)?

Logan vs. Spaulding Logging Co., supra, is the only Oregon case, so far as we know, construing Section 4 of Article XI with reference to the impairment of the riparian right. It was not overruled in the Hood River case, nor in the Deschutes case. In the Hood River

case it was cited in support of the statement that the riparian rule could be applied as to riparian owners involving the floating of logs, etc. It has never been overruled, and we maintain it is the law today. We urge that the Appellate Court should have applied it as the controlling decision of the Oregon court upon the impairment of the riparian right. It was so applied in the dissenting opinion here. We believe that the Federal Court should follow the Oregon case in the application of the Oregon Constitution protecting riparian rights from the operation of the Water Code, as so erroneously construed in the Hood River case.

We believe that such construction, if it causes the provision to violate the Federal Constitution, will not be followed in the Federal Court.

The state court held the Water Code to be constitutional in Re Willow Creek, supra, but this was based upon a citation of Section 1 of the Code, and Subdivision 1 of Section 70 of the Code. It also was connected with the announcement that riparian rights were vested and could not be disturbed by legislation or judicial decree.

This court has said that it will follow the state court in determining that a state law does not violate the state constitution.

Louisville Gas & E. Co. vs. Coleman,
277 U. S. 32-54,
72 Law Ed. 770 (1927).

Referring particularly to the U. S. Report, page 36.

But it also there held, that it is not bound by the finding of the state court as to whether the statute violates the "Equal Protection Clause" of the 14th Amendment.

But without reference to *Logan vs. Spaulding L. Co.* (supra), upon the constitutionality of the Water Code under the *Oregon* Constitution, the state court in the Hood River case has now construed the Code so as to make applicable *Logan vs. Spaulding* to the effect that an impairment of a riparian right is in violation of Section 4 of Article XI of the State Constitution.

Hence, we maintain that the Logan case was and is controlling and should have been followed in the Appellate Court.

CHAPTER VIII.

This chapter deals further with the construction of the Water Code under the following title:

(9) THE EXPRESSED PURPOSE OF THE WATER CODE. THE COURTS IN CONSTRUING STATE STATUTES GIVE GREAT WEIGHT AND CONSIDERATION TO THE TITLE OF THE ACT.

The Oregon Constitution, Article IV, Section 20 reads:

Oregon Code, 1930, Volume I, page 108:

Subject and Title of Act.

"§ 20. Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Examining the title, the Act provides a system for regulation, control, disposition, use and right to the use of water. The rest of the title has to do with determining *existing rights* thereto, provides penalties for violation, and appropriates money and declares an emergency.

Does that portion of an Act which destroys a riparian right come under the terms of the Act? Is the destruction of the right, *a regulation and control,* or does it

have to do with the distribution, use or right to use property? It may be said to have to do with the right to use water, because it destroys the right to use. But we think that the term "the right to the use of the water" must be construed with the terms "regulation, control, distribution and use." Had the Act been entitled one to *modify* the common law riparian doctrine, and henceforth deny some riparian proprietors the right to the use of the waters on which their lands border, would the meaning have been the same as that conveyed in the existing title to the Act? This raises the question, if not, —whether the Act would have been passed; whether an emergency clause denying the referendum would have been tolerated.

Section 1 permits all waters of the state to be appropriated for beneficial use *"subject to existing rights,"* and every permit issued by the State Engineer, including those involved in this case, reads, that the appropriations are "subject to existing rights." At least, all that we have seen, so read. But if they do not so read they do not comply with the terms of the Act.

An Appropriation.

What is the effect of a water appropriation—what are its attributes?

As the name implies, the appropriator takes something to himself, but he cannot legally do this if it is the property of another. Hence, the appropriate language in Section 1 of the Code:

> "Subject to existing rights all waters within the state may be appropriated for beneficial use. * * * but nothing herein contained shall be construed as to take away or impair the vested right of any person, firm or corporation or association to any water."

The petitioner maintains that it is in this class, it is a person, it is a corporation, and the taking of its property *is forbidden by the terms of Section* 1.

This question then follows:

Is Section 1 altered or changed by any other provision of the Act? No other section deals with the same subject except Section 70. Did the Legislature by that section intend to change the provisions of Section 1? Section 70 answers that question. Subdivision 1 thereof (Brief, page 124).

> "Nothing in this Act contained shall impair the vested right of any person, association or corporation to the use of the water."

Section 1 of the Act reads:

> "but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water." (Brief, page 124).

Observe that the difference is in the wording only. Subdivision 1 of Section 70 omits the words

> "but nothing herein contained shall be so *construed* as to take away or"

making Section 1 to read:

> "Nothing in this act contained shall impair the vested right of any person," etc.

Is it now to be "*so construed* as to take away" vested rights, guarded by Subdivision ONE? So petitioner finds its property saved to it by the terms of both Section 1 at the beginning of the Act, and Section 70 at its close.

But in the Hood River case, fifteen years after the enactment of the statute, it was *discovered* that the Legislature *had intentionally done away with Subdivision* 1 of Section 70, and done away with Section 1 of the Act in this language:

(Subdivision 2 of Section 70, Appx. 29-30):

> "Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to *create* in such riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years."

This language, interpreted as it reads, seems to mean to say that an actual beneficial use of water before the enactment, by a riparian proprietor, is *deemed*, that is, held or determined, to create in the riparian proprietor a vested right to the extent of the actual use. Stripped of its verbage, it means that the riparian proprietor is deemed to be an appropriator to the extent of the actual application and use of the water at the date of the Act. This can amount to nothing but a classification of his right. The attributes of an appropriation are different from those of a riparian right. But by putting him who

had used his riparian right, in the class of an appropriator, he becomes subject to the terms of the Act relating to appropriators, and falls under the same regulations as are provided for appropriators. To us it seems that Subdivision 2 *affects only the riparian who had then* applied the water to a beneficial use. We cannot read anything into the Act. It does not contain anything applying to one who had not so used the water beneficially. It merely crowns, as an appropriator, the riparian who had beneficially used some water prior to the enactment.

Can anyone find in this language of Subdivision 2 a word or a phrase to justify the Oregon Court in *Re Hood River* in saying, as is now contended, that the Legislature destroyed the unused vested rights by this so-called *definition.* It is said that it defines the vested riparian right as one which had been used before the passage of the Act. *But it does not do anything of the kind.* It says that such beneficial use *shall be deemed to create* a vested right to the extent of the actual application to a beneficial use. This is splendid language with which to define an appropriation.

CHAPTER IX.

(10) THE EMINENT DOMAIN CLAUSE OF THE WATER CODE, SECTION 72.

The 1909 Legislature in its efforts to enact a statute that would respect the rights guaranteed by the Federal Constitution, and yet provide a system that would permit waters, water rights and property of every kind needed for public use, to be taken and applied therefor, added to the Water Code, Section 72, providing the right of eminent domain therefor. (Appx. 32).

This provision grants not only to the United States and the State of Oregon, but to any person, foreign or domestic corporation or association, the right of eminent domain to acquire for public use any property or rights then or thereafter existing when found necessary "for the application of water to beneficial uses" and to use such property, if necessary, "in common with the former owner." It also allows condemnation of rights to conduct water from and over the lands of another for public uses, including the right to raise water by means of dams, reservoirs, etc., to make it available for the use intended.

This provided the constitutional way in which to acquire vested riparian rights, or any other property right, for public purposes. Of course, whether the use is public or not is a matter for the courts to decide, and so the Oregon court has held. Such procedure would give

due process of law and provide compensation for property taken.

In seeking to determine whether it was the intention of the Legislature to unconstitutionally destroy vested riparian rights for the general good of the public, or for any public use, we cannot disregard the well-known canons of statutory construction which require the consideration of the act as a whole. In applying such rules of construction we necessarily step down from Subdivision 2 of Section 70 and construe the "Eminent Domain Clause" in connection therewith.

OTHER EMINENT DOMAIN STATUTES OF THE 1909 SESSION.

To further show the unsoundness of the construction attempted to be put upon Subdivision 70 of the Water Code, we cite:

Chapter 75, Oregon Laws of 1909, pages 132-4.

At the time that the 1909 Legislature was passing the Water Code, Chapter 1 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, Volume 2, page 1603-4, etc., provided for the appropriation of water for general use and irrigation.

The first section in the chapter was the Code Section 4993, followed by Section 4994, with which we are concerned.

Section 4993 declared the use of the waters of the lakes and running streams for general rental, sales and

distribution purposes for supplying irrigation waters, etc., to be a public use.

Section 4994 of the B. & C. Code granted to corporations, organized for the construction, etc., of canals for general irrigation purposes and other purposes, the right to appropriate and divert water from natural stream beds and channels, and that it may

> "condemn right of way for its ditch, or canal or flume, and may condemn the rights of *riparian proprietors upon the lake or stream from which such appropriation is made,* upon complying with the terms of this act."

It followed with further rights to condemn reservoirs, cites for storage, etc.

The 1909 Legislature by Chapter 75, page 132-4, of the 1909 Session Laws, amended said Section 4994 as follows:

> "Sec. 4994. A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above described, may appropriate and divert water from its natural bed or channel, and condemn right of way for its ditch, or canal, or flume, *and may condemn the rights of riparian proprietors upon the lake or stream upon which such appropriation is made, upon complying with the terms of this act.*"

The Act by Section 3, page 133-4, amended Section 5075 of said B. & C. Code, (as it had been amended in 1907), so as to provide among other things as follows:

> "And any such corporation mentioned in Section 5074 (public service corporation) may also appro-

priate and *condemn the rights of riparian proprietors in any* lake or stream, to enable such corporation to develop, manufacture, or furnish electrical energy for lighting or power purposes, for the operation of any railway in this State, or to manufacture, furnish, or sell electrical energy for lighting or power purposes to any city or town in this State, or to any public service corporation doing business therein;"

This Section (B. and C.) 5075 is now without change Section 37-102 Oregon Code 1930.

This act contained no emergency clause, and therefore, went into effect at the expiration of ninety days following the adjournment of the 1909 Session, and it adjourned on February 20, 1909.

So that by its own act, intentionally made so as to take effect *after* the effective date of the Water Code, the Legislature expressly provided for the condemnation of these vested riparian rights for public purposes. The emergency recited in the "Emergency Clause" of the Water Code, did not exist in this act. The things imminent to be done according to that *emergency clause,* were to determine the vexatious controversies arising out of conflicting water right claims. This accomplished immediately by the "Emergency Clause," left the way open to condemn existing riparian rights, and take them constitutionally for public good and public use.

And with reference to the adjudication and determination of existing rights, Subdivision 8 of Section 70

of the Water Code (Appx. 31) provides as follows:

> "8. All rights *granted or declared* by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act."

Thus it is clear *that the only rights to be adjudicated* were those *granted* by Section 1 of the Act, (appropriations), or "*declared* by this Act" (prior appropriations or riparian rights used prior to the adoption of the Act), and these, only to the extent of their prior use. Such riparian rights were there made subject to being completed in accordance with the provisions of Subdivision 3 of Section 70.

There was no occasion to adjudicate the vested riparian right that by law accompanied the lands patented prior to the enactment of the Water Code. For the Oregon court said it "accompanies the ownership of riparian lands," in the adjudication *In Re Sucker Creek* (Appx. 67). A ministerial board could not well determine or adjudicate land titles nor undertake to separate riparian rights therefrom, such being part and parcel of the realty.

At that 1909 Session there was also passed Chapter 221, (quoted at Appx. 70). As elsewhere explained it declared all waters within the state from all sources of water supply to belong to the public. And it required water appropriated to develop power to be subject to the payment of certain fees therein provided for.

Will one calmly enter upon the task of construing the Water Code without a reference to or a consideration

of, these two additional acts passed at the same session? Inasmuch as they are upon the same general subject, must they not be read in connection with the Water Code? Do they not have an important bearing upon the intention and purposes of the Legislature in enacting the Code?

And will it then be presumed (without anything in the Code to justify it) that the Legislature intended to destroy petitioner's vested riparian rights, and yet grant the power of eminent domain to take such rights for public use?

These acts considered together leave no reasonable ground for an assumption, or for even a guess, that the Legislature found it necessary to, and did use, the police power of the state to *abrogate,* (without due or any process of law), such vested riparian rights as those which the petitioner is defending herein.

The first section of said Chapter 221 of the 1909 Laws provides

> "All water within the state from all sources of water supply belong to the public."

Section 1 of the Code provides for appropriations made in accordance with the Code *and not otherwise,* and that they are subject to existing rights.

The effect of these two acts was, therefore, to cut off the riparian doctrine as applicable to lands patented *subsequent* to the enactment of the Code; and to adjudicate the unknown or disputed rights, there being no oc-

casion to adjudicate the riparian rights which *accompanied* the lands riparian to the stream.

The effect of such legislation could not impair the riparian rights which vested prior to the enactment of the Code. For as was said by Chief Justice Marshall here in 1817,

> "It will be admitted that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired."

Chirac vs. The Lessee of Chirac,
2nd Wheaton at 277,
4th Law Ed. 234.
(Quotation from 239).

The sound principles of Marshall found crystallization in Section 1 of the 14th Amendment to our Federal Constitution.

Where the intent of a statute is plainly expressed in its language, such intent will be followed without further inquiry. There is no safer or better settled canon of interpretation than when the language is clear and unambiguous, it must be held to mean what it expresses.

Lewis' Sutherland Statutory Construction,
2nd Ed.
Section 367 (238).

The language of the Water Code plainly expresses the subjects to be dealt with and the intention which the legislature sought to express. We are not unmindful that this court would be disposed to follow the construction of the Oregon court upon an Oregon statute. We

are not advised as to how far this court would follow a construction that arises, not from any words in the statute, but from reading provisions into the statute. But, be this all as it may, this court certainly cannot by construction be led to the approval of a statute thereby made to violate the Federal Constitution. The court would perhaps prefer to determine the meaning of the section itself than to find that the act as construed, but not as drawn, violates the Constitution.

The entire statute must be considered in ascertaining the intent.

Lewis' Sutherland, Section 368 (239).

Here the text states that the practical inquiry is usually what the particular provision or clause or word means; that to answer it one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument; that a statute is passed as a whole and not in parts or sections; it is animated by one general purpose and intent. Consequently one particular part or section should be construed in connection with every other part or section so as to produce a harmonious whole. The intention of the whole act will control the interpretation of the parts thereof.

Lewis' Sutherland, Section 370 (241).

The text is to the effect that words and clauses in different parts of the statute must be read in a sense

which harmonizes with the subject matter and general purpose of the act; that the intention of the act involves consideration of the subject matter, and the change in, or in addition to, the law which it proposes. "Hence the supreme importance of the rule that the statute must be construed with reference to its general purpose and aim."

CHAPTER X.

(11) ADJUDICATIONS PROVIDED FOR.

The title of the Act reads:

> "Providing a system for the regulation, control, disposition, use and right to the use of water, *and for the determination of existing rights thereto,*" etc.

Subdivision 8 of Section 70, as far as concerns the title, reads:

> "8. All rights *granted* or *declared* by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act."

Subdivision 8 refers back to the title. The title is required to embrace all that is in Section 8, and "all matters properly connected therewith." The matters properly connected therewith are expressed in Subdivision 8, as just set forth above. They are the rights that have been *granted* in the Act, or that have been *declared* in the Act. So far as the question here is concerned, this could only relate to the provisions of Section 1 of the Act, allowing an appropriation subject to existing rights, or to Subdivision 2 of Section 70, providing that actual application of water prior to the Act shall be *deemed to create* a vested right to the extent of application to a beneficial use.

Did the Legislature intend to preserve enough of the riparian rights *that had not been used* before the passage of the Act, *to be adjudicated* under the Act? Such

vested rights as those of the petitioner seem to have been consumed. Hence, the question:

Was it contemplated that riparian proprietors who had not so used their riparian rights, should be served with process? Was it contemplated that such rights should be adjudicated, or the subject of adjudication? Was anything contemplated except that the adjudication should by decree, as well as legislative act, wipe them out of existence? We mean the Act, as construed in *Re Hood River,* and as that case is followed in the majority opinion of the Appellate Court in this case. A proper answer to these several questions would cause one to again read Section 1 of the 14th Amendment.

No matter to what extent the Federal Court may feel bound to adopt the construction of the State Court, construing a statute of its own state, nevertheless it will never adopt a state construction which causes the Act to be construed so that in its operation it violates the Constitution of the United States, when it can be construed in harmony therewith.

Statutes must be interpreted if possible so as to make them consistent with the Constitution and the paramount law.

Herman Presser, Plaintiff in Error, vs.
People of the State of Illinois.
116 U. S. 252,
29 Law Ed. 615.

That construction of a statute should be adopted which, without doing violence to the fair meaning of the

words used, brings it into harmony with the Constitution.

Board of Supervisors of Granada County vs. Brown et al,
112 U. S. 261-273,
28 Law Ed. 704-8.

The title of an act may be resorted to, to aid in its construction if ambiguity exists.

The Coosaw Mining Company vs. The State of South Carolina et al,
144 U. S. 550-567,
36 Law Ed. 537-544.

We think that no ambiguity exists. But should it be thought to exist, this title to the Water Code will be helpful as showing that it does not contain anything relating to the impairment or limitation of riparian rights, being an Act providing a system for the regulation, control, distribution and use, and right to the use of water, and for the determination of existing rights thereto, etc.

CHAPTER XI.

Was it within the province of the Legislature to effectively declare what constituted vested riparian rights?

The Hood River case declared that it was within the power of the Legislature so to do. We maintain that the Legislature may declare what the law shall be in the future. But that if it presumes to declare the law as of the date of the enactment, it invades the province of the judiciary, and its definition of a vested riparian right should be disregarded by the courts.

We discuss that subject under the title

(12) LEGISLATIVE AND JUDICIARY POWERS. IF IN THE WATER CODE THE LEGISLATURE DEFINED WHAT THEN CONSTITUTED THE VESTED RIGHT OF RIPARIAN OWNERS, IT INVADED THE PROVINCE OF THE JUDICIARY, AND ITS ACTION MUST BE DISREGARDED BY THE COURT.

The Oregon Court in

Re Water Rights of Hood River,
114 Or. 112, (227 Pac. 1065) (1924)

at page 181 said:

> "It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and

> under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor." (here follow citations of *Kansas v. Colorado,* and numerous other cases, none of which, we believe, support the text).

Of course the legislature can define for the future what shall constitute a vested right, but it cannot destroy vested rights existing at the time of the legislative declaration, nor do we think authorities can be found to support such a doctrine.

The opinion in the Hood River case applied this definition, and thereby destroyed the vested rights of a riparian proprietor whose lands were granted prior to the enactment of the Desert Land Act of March 3, 1877.

We quote from page 182 of the opinion:

> "Under our present statute, *defining* what shall constitute a *vested right* of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

Cooley's Constitutional Limitations, Seventh Edition, Chapter V, pages 134-137:

> "DECLARATORY STATUTES.
>
> Legislation is either introductory of new rules, or it is declaratory of existing rules. 'A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been.' Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was be-

fore it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts. Thus Mr. Fox's Libel Act declared that, by the law of England, juries were judges of the law in prosecutions for libel; it did not purport to introduce a new rule, but to declare a rule already and always in force. Yet previous to the passage of this act the courts had repeatedly held that the jury in these cases were only to pass upon the fact of publication and the truth of the innuendoes; and whether the publication was libelous or not was a question of law which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. So in the State of New York, after the courts had held that insurance companies were taxable to a certain extent under an existing statute, the legislature passed another act, declaring that such companies were only taxable at a certain other rate; and it was thereby declared that such was the intention and true construction of the original statute. In these cases it will be perceived that the courts, in the due exercise of their authority as interpreters of the laws, have declared what the rule established by the common law or by statute is, and that the legislature has then interposed, put its own construction upon the existing law, and in effect declared the judicial interpretation to be unfounded and unwarrantable. The courts in these cases have clearly kept within the proper limits of their jurisdiction, and if they have erred, the error has been one of judgment only, and has not extended to usurpation of power. Was the legislature also within the limits of its authority when it passed the declaratory statute?

The decision of this question must depend perhaps upon the purpose which was in the mind of the legislature in passing the declaratory statute;

whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; *and where the statute* is only to operate *upon future cases*, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.

As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law, *is*, or *has been* is a judicial power; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial.' If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment."

This is the doctrine of the Oregon Court as announced in

Macartney v. Shipherd, 60 Or. 133-143, (117 Pac. 814) (1911) (Appx. 109)

In this case, the Oregon Court quoted the language of Judge Cooley, supra, as used by the Supreme Court of Virginia, —

> "To declare what the law is or has been, is judicial power; to declare what the law shall be, is legislative."

The Oregon case cited with approval:

Thomas v. Portland, 40 Or. 50,
(66 Pac. 439).

Both of these Oregon cases lay down the doctrine that legislative acts which are declaratory of the existing law are plainly invasions of the judicial power by the legislative assembly and are not controlling. We quote at length from *Macartney v. Shipherd, supra,* at Appx. 109-111.

That case was cited and followed by the Oregon Court in a decision of February 16, 1933:

Roles Shingle Co. v. Bergerson, et al.,
142 Or. 131; (19 Pac. (2d) 94).

As we have heretofore abundantly shown, acts which declare and announce the existing law, are universally held to operate upon future transactions; they cannot operate retrospectively, without invading the judiciary, and perhaps violating constitutional guarantees.

The foregoing is in harmony with the doctrine of this court as expressed in the

Sinking Fund Cases,
99 U. S. 700, 761,
25 Law Ed. 496.

We quote from the 99 U. S. at page 761:

> "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

The foregoing case was cited with approval by the Supreme Court of California in

East Bay Municipal Utility Dist. v. Department of Public Works et al,
35 Pac. (2d), 1027 (1934).

CHAPTER XII.

Was the majority opinion herein correct in assuming that the "Emergency Clause" to the Water Code was affixed thereto for the purpose of declaring that the Act was the exercise of the police power of the state? We think not. We believe that the conclusion is erroneous. However, without an understanding of the office which the "Emergency Clause" fills in the Referendum Amendment to the Oregon Constitution, the court's conclusion was to have been expected. Early after the passage of the Referendum Amendment it became necessary, in the interpretation of legislative acts, to define the office of the "Emergency Clause" as it was defined in the Kadderly case. The Act upon which it is used may or may not be the exercise of police power, because its only purpose is to prevent a referendum of the Act to the people.

We discuss the subject under the following title:

(13) EMERGENCY CLAUSE — THE 1909 WATER CODE.

The majority opinion herein cites the "Emergency Clause" at the foot of the Water Code, Section 74, (Appx. 33). It is there said:

> "The Oregon Water Code of 1909 itself purported to be an exercise of the police power of the state, as shown by Section 74." (R. 443-4; 73 F. (2d) 567).

In 1902 the Oregon Constitution was amended by the addition of the referendum provision, under which legislative acts were made subject to approval by the people. But the amendment excepted from the provision of the referendum, laws necessary for the immediate preservation of the public peace, health or safety. The amendment is set forth at Appendix 34-5.

In 1903 that amendment was construed by the Oregon court in

Kadderly vs. Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222. (Dec. 1903).

The opinion in that case is comprehensive and decisive, and construed the emergency clause as follows:

That as to laws necessary for the immediate preservation of the public peace, health and safety, the action of the legislative and executive departments is conclusive and final, so far as the enactment is concerned. No power is reserved to the people to approve or disapprove them, (App. 36); That the police power is limited to the imposition of restraints and burdens on persons and property, in order to secure the general comfort, health and prosperity of the state. But that the language of the referendum amendment is broader, and includes all laws of whatever kind necessary for the immediate preservation of the public peace, health or safety, whether they impose restraints on persons and property, or come strictly within the police power, or not. That the laws excepted from the operation of the amendment, do not depend alone upon their *character*,

but upon the necessity of their enactment, in order to accomplish certain purposes; that as to such laws the amendment does not in any way abridge or restrict the power of the Legislature, *which by the insertion of a proper emergency clause,* may unquestionably *cause them to go into effect upon approval by the Governor.* That as the Legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare what shall be deemed laws of the character indicated, who is to decide whether a specific Act may or may not be necessary for the purpose?,—answering the Legislature. (Appx. 36-7). We commend the quotation made in the appendix as of value here.

Cameron vs. Stevens, 121 Ore. 538 (1927), 256 Pac. 395 (Appx. 38).

holds that the effect of an emergency clause upon an Act is to cause it to become effective upon approval by the Governor, and to prevent its *not* going into effect until after the expiration of the period otherwise prescribed by the Constitution, (Sec. 28, Art. IV Oregon Constitution, Ore. Code 1930, page 120, Appx. 35).

Colorado, Arizona and Ohio took their referendum amendments from Oregon, or largely so, and all followed the construction put on the emergency clause thereof, in the Kadderly case. Decisions of these courts with references to their statutes are to be found at Appendix 39-40.

So we urge this point:

That the "Emergency Clause" to the 1909 Water Code *cannot* be said to indicate the intention of the Legislature, to declare the entire Act, the exercise of the police power, as claimed in the opinion, (73 F. (2d) (567, R. 443). Under the referendum amendment, laws declared in the Act to be necessary for the purposes specified, cannot be referred to the people.

We do not say but what the 1909 Act was to a limited extent the exercise of the police power. This Court so interpreted the decision of the Oregon court *In Re Willow Creek, (Pacific Livestock Co. vs. Lewis* cited below).

The Act did appoint a board to take charge of certain regulations of the use of the waters in the Oregon streams. And it did make the decision of the Water Board in Adjudications, effective (unless a stay bond were filed), until the decision could be reviewed by the Circuit Court to which it was referred.

But it took fifteen years following the enactment of the Code, for the Oregon court to *discover,* if indeed it did discover it, that Section 70, *by the use of the police power,* so intended to, and did, destroy the vested rights of the riparian owner, who, holding them as he had a right to do, had not as yet beneficially used them, when the Act became effective. As originally drawn this Water Code was Senate Bill Number 77, "A Bill for an Act to regulate, control and distribute water, and right

to use same." (1909 Senate Journal, page 95). It was introduced January 20, 1909. As originally drawn it did not have *this* Section 70. This did not come until nearly the close of the Session, February 11, 1909. (Senate Journal 449-51). With this Amendment there also then came Section 72, the "Eminent Domain" clause, and, if you please, Section 74, the "Emergency Clause," (Senate Journal 452-3).

We realize that courts seek the intention of the legislature in the construction of an Act, and we believe it may fairly be said that one who reads Section 1 and Section 70, (with its eight subdivisions), would at once come to the conclusion that was reached by this Court in the Pacific Livestock case, that it was not the intention of the Legislature to destroy any vested right in the use of the waters of any stream, whether or not the right had been used at the time of the enactment. By the terms of the Act, as it was introduced, it did not purport to make a distinction between riparian rights that had been used, and those that had not been used.

CHAPTER XIII.

There was what purported to be an adjudication of the waters of the Rogue River, Defendants' Exhibit "O" (R. 294), of date April 26, 1919. It was not pled as an estoppel, nor as an adjudication of any rights, nor to debar the rights of any of the parties here. It had no probative value to establish any fact in this case.

Lest its presence in the record might confuse, we discuss it briefly so far as concerns the issues.

(14) THE ROGUE RIVER ADJUDICATION.

This purports to be an adjudication of the rights of Rogue River, had under the 1909 Water Code. A certified copy of the decree is Defendants (Respondent's) Exhibit "O". (This document is in pamphlet form). It was offered in evidence by the defendants (respondents); objections were made to its introduction, and it was received under the condition that the court would take the objections under advisement. Apparently the objections were not passed upon (R. 294). The record recites certain provisions therefrom. They are to be found in paragraph IV at R. 295-6, and following. At Appx. 99-100, we set out from R. 295-6 the provisions of the decree with reference to the service of process. It is a recital that although certain water users had been served, they had failed and neglected to appear, or to submit or offer any proof of any right, title, interest, or claim in or to the use of, or the waters, or

flow of the waters of the river or its tributaries, involved in the proceeding. It contained an adjudication that they were in default, and not entitled to any right, title or interest in the water; and that they did not have any riparian rights therein, and that each of those so listed were forever barred and estopped from asserting any rights to the use of Rogue River or its tributaries. Following this in the record is a long list of names alphabetically arranged to which the above finding applies. The record then shows:

> "The names of the following companies or corporations do not appear in said list of parties served, and against whom default was entered, as stated in Paragraph IV."

There is then listed the names of six corporations. Among these there is the name of the petitioner. There is also the name of another company of a similar name, which was a predecessor of the petitioner in the ownership of these lands. There is also the name of Condor Water and Power Company, which the record shows at one time was the owner of petitioner's property.

The record does not show that the petitioner was ever served with process in said cause. In fact, petitioner was not in existence at the institution of the cause. Petitioner was incorporated in the year 1920. (The Bill of Complaint, Paragraph I (R. 5), admitted in the Answer, Paragraph I (R. 21).

The decree was not pled in estoppel. If petitioner had been a party thereto, the answer would have pled

the decree in estoppel against petitioner's contentions. The significant fact is, that the owner of petitioner's lands, at the time of the adjudication, was not served. We account for this in the language of the Water Code. Subdivision 8, (Appx. 31) of Section 70 (Appx. 29). reads:

> "8. All rights *granted* or *declared by* this act *shall be adjudicated* and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect."

We believe that the language of this Subdivision 8 was responsible for serving only those riparian proprietors whose lands showed ditches, dams, or other works for the use of the water. At least, we interpret the language just quoted from the decree, as to service of process, to mean just that.

The language of the decree, in effect, is that the following named persons, etc., although duly and regularly notified, etc., have failed to appear and submit any proof of any rights, etc., to the use of the waters or to the flow of the waters of Rogue River, etc., are in default,

> "and are not entitled to any right, title, or interest in or to the waters involved in these proceedings, nor any part thereof, nor to any riparian rights, rights by appropriation or prescription or otherwise in respect to the diversion or use of said waters," etc.

The paragraph certainly furnishes no reason to believe that the then owner of petitioner's land was served with process.

The law covering this situation is very plain and definite, indeed. The section providing for the service, and for appearances in the proceedings was construed by the Oregon Court In Re Willow Creek. That decision holds that the Code section precludes the making of a decree or determination binding and conclusive upon any not served with notice. It then refers to Section 34, Appx. 13, 14, which provides that parties not served, who have knowledge of the proceedings, may intervene on equitable terms within a year *or be precluded* from having any rights *adjudicated* in such proceedings. The construction of Section 34, as applied here, would make the decree ineffective as to the owner of petitioner's lands, even if it had known of the existence of the suit, and had an opportunity to appear.

We make the following quotation from

In Re Willow Creek, 74 Or. 592,
(144 Pac. 505, 146 Pac. 475). (1915)

at pages 617-18:

> "10-12. The objections to the process are evidently directed to that part of Section 34 referring to persons who are interested in the water of a stream upon which an investigation and determination are made, upon whom no service of notice is had. Section 33 in effect declares a decree of the court confirming a determination of the board to be conclusive as to claimants *lawfully embraced in the determination.* This declaration *precludes mak-*

ing such decree or order of determination binding and conclusive upon any except those upon whom service of notice has been made pursuant to the statute. Section 34 states that it is the duty of all claimants when such proceedings are instituted to submit proof of their claims. The latter part of this section, particularly referring to interested parties who have not been served with notice, provides that such parties who had no knowledge or notice of the pendency of the proceedings may intervene upon equitable terms at any time within one year, or be precluded from having their rights adjudicated in such proceeding; that is, the words 'any such claimant' who fails to submit proof of his claim and is barred and estopped from subsequently asserting any prior rights refer to 'existing claimants upon the stream or other body of water lawfully embraced in the determination,' including *only* those who have been duly served with process."

In the respondent's brief resisting the petition for the writ herein, it was claimed that those claiming rights to an adjudicated stream must claim through the adjudication, if the claim asserted antedates the adjudication. In support thereof, the provisions of the Code are cited, together with cases there listed at page 4 of Respondent's brief. What has just been said will, with the citation from In Re Willow Creek, fully answer this claim.

CHAPTER XIV.

(15) THE DESERT LAND ACT.

(Assignment of Error Number 4)

At some proceeding in the case mention was made of the construction placed upon the Desert Land Act of March 3rd, 1877, by the Oregon Court in *Hough vs. Porter,* cited below. That construction was to the effect that the Act severed from lands patented after the date of the Act all of their riparian rights, leaving the waters subject to appropriation for the reclamation of arid lands; that it affected all lands wherever situated, whether arid or not, and the rights of all parties acquiring lands after the passage of the Act, whether the same were acquired for the purposes of the Act or not. The decision was rendered by Commissioner King, who evidently constructed the opinion at odd times over a long period. His purpose was plainly to make way for the passage of the Water Code. After its passage adjudications of rights were made without regard to the effect of the decision, except in a few instances.

At the time of the discovery of this severance of the riparian rights from lands patented subsequent to the enactment of the Land Act, there had been adjudications over a period of thirty-two years in total ignorance of this condition. In the opinion in *Hough vs. Porter* the writer thereof sought to harmonize with his theory all of the water decisions that had been made

in the interim. From a consideration of the cases which we have cited, decided during that period, the court will readily believe that the task was rather difficult of performance.

The Commissioner had some trouble reconciling *Sturr vs. Beck* with his theory, but nothing was sufficiently difficult to prevent the Commissioner from ultimately arriving at the desired result. Applied, it would make a mess of titles in Oregon, some of which would be bottom lands on the streams, which could not under any stretch of the imagination, be termed as desert lands. Others would be mountainous lands, high above reclamation projects, and some, of course, would be in the arid country. As a national Act, it would certainly work havoe with land titles in various jurisdictions. Persons owning meadow lands in the eastern part of the United States, which have been enjoying the exercise of the use of their riparian rights from the streams on which they border, would suddenly find them rendered arid indeed, and stripped of their value.

Washington refused to follow *Hough vs. Porter;* California also refused to follow it, although two other states did follow it. The majority opinion here seemed to be to the effect that the decision is unsound, and the presiding Judge, in the dissenting opinion, accepted that as the court's view. But because of the language in the majority opinion, and because of the necessity of

a construction of this Act upon that point, the matter is of real importance here, and we proceed to consider it.

The Desert Land Act is the Act of March 3rd, 1877, Title 43, United States Code Annotated.

The sections material to the questions involved here are, as taken from U. S. C. A. Title 43, Sections 321, 322 and 323, which are set out in full at Appendix 103-5.

Their importance, if any here, arises from the fact that just before, or rather at the time of, the Session of the Oregon Legislature of 1909, which enacted the Water Code, the case of

Hough vs. Porter,
51 Ore. 318-456; 95 Pac. 732; 98 P. 1083.

was decided by the Oregon Court.

In a lengthy opinion the Supreme Court determined in effect that this Act denuded all public lands of their riparian rights in the streams on which they bordered. In effect, that lands patented subsequent to that date did not carry such riparian rights because the same had been severed from the public lands by that Act. Petitioner contends that the decision is unsound, and the Act is not subject to that construction, and that the construction does not affect plaintiff's claim to common law riparian rights which were acquired by its predecessor upon the issuance of the patent.

In support thereof petitioner makes these points:

1. That the Congress did not in that enactment in-

tend to interfere with the riparian doctrine as applied in the states.

Kansas vs. Colorado, 206 U. S. pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

Here this Court decided that states could determine for themselves whether or not they would adopt the riparian doctrine.

In

John E. Scott vs. Charles P. Lattig,
227 U. S. Supreme Court, 229-245,
57 Law Ed. 490, 33 Sup. Ct. 242.
Decided February 3, 1913,

it is said in effect that this court does not hesitate to decide that Congress in making the distinction between streams navigable and those not navigable intended to provide that the common law rules of riparian ownership would apply to lands bordering on the latter, but that the title to the lands bordering on navigable streams should stop at the stream.

In

U. S. v. Rio Grande Dam & I. Co.,
174 U. S. 690,
19 Sup. Ct. 770,
43 L. Ed. 1136, 1141,

this court said that it is the unquestioned rule of the common law that every riparian owner was entitled to the continuous flow of the stream.

Sturr, Appellant, v. Beck,
133 U. S. 541-552,
33 Law Ed. 761.

This is a decision of 1889, dealing with a patent issued in March 1883, based upon an entry upon the land made in March, 1877. The question arose between the riparian right of the settler and one who sought to take the water from the land by right initiated subsequent to the entry upon the land. The decision was rendered in 1899.

Certainly this court knew of the existence of the Desert Land Act of March 3rd, 1877. And certainly counsel would have called the attention of the court to it, if it had any bearing upon the case.

We quote from that opinion at length at the Appx. 57-58-59.

That case and

Faull v. Cooke, supra,
Larsen v. The O. R. & N. Co., supra,
Brown vs. Baker, supra,

are all to the effect that rights for appropriation are cut off by the entry upon the lands for settlement followed by compliance with the law and the issuance of the patent.

United States v. Central Stockholders Corporation, 52 F. (2d) 322-339, 329, (a quotation therefrom is set out at Appx. 106 where the volume is erroneously stated as 51 F. (2d) instead of 52).

It is to the effect that the long acquiesence of the federal government in the use of waters arising on or flowing through public lands, leads to the conclusion that it has been the constant policy of the government of

the United States to allow the citizens of the various states to work out their own system of law with relation to water rights, without intervention or adverse legislation by the federal government.

See also

Still et al v. Palouse Irrigation & Power Co. et al (Supreme Court of Washington. Aug. 19, 1911) 117 Pac. 466, 468-9,

a decision of the Supreme Court of Washington, discussing *Hough vs. Porter et al,* and in which the court declined to follow the Oregon court in the construction of the Desert Land Act.

See also

San Joaquin & Kings River Canal & Irr. Co. v. Worswick,
203 Pac. 999-1008.
(Supreme Court of California, Jan. 4, 1922),

where the Supreme Court of California likewise refused to follow *Hough vs. Porter* in construction of that Act. That court said there was nothing in the Act that justified giving that particular part of it thus construed so wide an application as to embrace all the lands of the United States wherever situated. That the plaintiffs in that case did not claim that any of the land belonging to defendants was purchased or acquired under the Desert Land Act, and that the Act itself commits the determination of the question as to what may be considered desert land to the Commissioner of the General Land Office.

The majority opinion of the Appellate Court in this case seemed to hold that *Hough vs. Porter* is unsound. We discuss the case, however, only because the opinion stated that the Appellate Court need not decide whether or not it should follow *Hough vs. Porter* in considering petitioner's patent IF the Hood River case and the Water Code could withstand petitioner's attacks on constitutional grounds. (R. 428, 73 F. (2d) 562). Except for this statement, we would have believed that the writer of the opinion had a very definite idea when this statement was written, as to whether or not the Hood River case and the Water Code *could* withstand these constitutional attacks.

Mr. Justice Wilbur, Senior Judge, dissenting, concurred in that portion of the main opinion which construed the Desert Land Act. Undoubtedly, reading the opinion, with the majority opinion, it definitely determined that the construction of the Desert Land Act in *Hough vs. Porter* was unsound, and that petitioner's patent was not affected by the doctrine of that case.

Petitioner believes it is entitled to have the decision of the federal court in the construction of a federal statute applicable to the entire country.

Two other states have followed *Hough vs. Porter*, and soon we will have such a diversity of opinion that titles throughout the Nation will be rendered uncertain.

Furthermore, Oregon will have scattered here and there over the entire state lands patented before and

lands patented after March 3rd, 1877. So there will be confusion and distinction which the Congress never intended should exist. Hence we make Point 2 under this title, and cite:

Pease v. Peck, 59 U. S. 595,
18 How. 595-601,
15 Law Ed. 518, 520. (May 14, 1856).

In this case it was said that where the Constitution and laws of the United States are drawn in question, the courts of the United States must determine the controversy for themselves.

We know that this Court will want uniformity in decisions affecting federal statutes; that the federal courts might themselves desire at some time to construe this statute more definitely than it has had occasion to do. And we believe that the matter should be determined here.

It is also there held that this Court does not feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in the Circuit Court, to reverse that decision contrary to its own convictions in order to conform to a state decision made in the meantime. "Such decisions have not the character of established precedent declarative of the settled law of a state." Similarly, we argue that this court would not feel bound to follow state construction of a federal statute that did not meet with this court's approval.

CHAPTER XV.

(16) THE POLICE POWER.

The majority opinion in the Appellate Court decided adversely to the petitioner by holding that the state in the Water Code exercised the police power of the state in the destruction of those riparian rights in which the water had not been beneficially applied before the enactment.

We cite the following from the opinion:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the state as shown by Section 74:
>
> 'Emergency.—Whereas, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and Whereas, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor.'" (R. 443-4; 73 Fed. (2d) 567).

At pages 173-176, herein under the title of "Emergency Clause—The 1909 Water Code," we quote *Kadderly vs. Portland, supra*, the controlling Oregon case holding that such an emergency clause attached to a legislative act is for the purpose of preventing

the same from being referred to the people under the referendum powers of the Oregon Constitution; that such laws so excepted by such emergency clause from the operation of the referendum do not depend alone upon their *character,* but upon the necessity of their enactment to accomplish certain purposes. That as the Constitutional Amendment does not declare what shall be deemed laws of the character indicated, the Legislature must necessarily determine that question. But that it is the duty of the courts after the law has been enacted to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it to ascertain the rights of the litigant.

We also there cite Cameron vs. Stevens, an Oregon case of 1927, to the effect that the clause is used for the purpose of preventing a referendum of the act to the people. Therefore, the Appellate Court is clearly in error in assuming that the emergency clause caused the act to declare that it was in fact an exercise of the police power, having no relation whatever to the police power. But if it had related to the police power, let us see upon what subjects the reference was made.

The emergency clause recites in brief that there is great uncertainty as to the existing water rights of various parties along the streams, entailing expensive litigation, engendering many animosities and much bad blood, THEREBY endangering the public peace and safety of many sections of the state.

This far it is dealing with the subject of adjudicating the rights to the use of the waters of the stream.

It continues:

Whereas it is urgent

> "that these conditions be remedied for the preservation of the public peace, health and safety of the state, this act shall be in full force and effect from and after its approval by the Governor."

So the conclusion covers the same subject. In other words, the urgency was the necessity for the adjudication of the respective rights of the users.

There is in the emergency clause no suggestion of any imminent danger to the public peace, etc., unless riparian rights be at once "abrogated;" there is no suggestion that there is any great haste required to give an appropriator the right to appropriate the waters belonging to the riparian proprietors. There is no suggestion that it is immediately necessary that riparian proprietors may have opportunity to appropriate the water belonging to other riparian proprietors. If there were shown in the act any intention to discriminate against those holding, under the riparian doctrine, the emergency clause did not indicate any urgent public demand for a law so discriminating.

Let us see what the purposes of the Act were. According to the title, the Act was to provide a system for the regulation, control, distribution, use and right to the use of water; for the determination of existing rights thereto, etc.

Under our Point 4, chapter III, page 116 hereof, we quote from In Re Willow Creek, 74 Ore. at 610, where the Oregon court said in substance:

That it is evident that in the enactment, the state being interested in providing a system for the "regulation of the use of water" and for the "determination of existing rights," exercised the police power in order to provide a complete system of CONTROL and a means for making the record of the respective rights of the users.

We also quoted from pages 613-14 of 74th Oregon, that the state enacted the Code to accelerate its development, promote peace and good order, minimize vexatious controversies, provide a convenient way for adjustment thereof, and for recording the rights of the various claimants. And that it thereby *"to a limited extent"* called into requisition the police power.

This court quoted the language there used in the Pacific Livestock case, supra. These expressions of the Oregon court defined the purposes of the Act as broadly as the title of the Act will permit.

In 1915, when the Willow Creek case was decided, the author of the opinion therein set forth the foregoing purposes that brought into being the Water Code. And though he was subsequently the writer of the opinion in the Hood River case, he apparently in 1915 did not have the belief that the police power was exercised in the confiscation of vested rights, nor to enable

the state to define what constituted a vested riparian right.

Inasmuch as the Appellate Court in this case decided the same by the application of the doctrine of police power, it would be interesting to know *whether the Oregon court has ever taken that view of the question;* whether the Oregon court had ever said that the Legislature in the enactment of the Code had exercised the state's police power in obliterating vested rights. And if so, in what case has the Oregon court so held? If it has said that riparian rights which had not been used before the enactment of the Code *were destroyed* by the state *in the exercise of its police power* through the enactment, we have not been able to discover the place in any opinion where the court so held.

If the declaration of such exercise of the police power is thought to be couched in the following language in the opinion in the Hood River case, we would like to consider the opinion from that standpoint. The language is: (p. 181).

> "It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor."

That paragraph was apparently meant to determine that the legislature had the power to invade the province of the courts, and to assert what was *then* a vested

right, and to make that rule applicable to prior acquired riparian rights. We think the language quoted was not intended to declare that the "definition" was made in the exercise of the police power, nor that the police power could be used to authorize the legislature to make decrees for the courts.

If, however, it should be thought that the declaration of the use of the police power is to be found in the following language at 182, we should like to discuss the matter from that standpoint.

> "Under our present statute, defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

The reference there to "our present statute" undoubtedly refers to the Water Code. No other statute with which we are acquainted could have been thought to determine a vested right *by definition.*

In the paragraph preceding that last quoted at page 182 is the following:

> "The statute of this state plainly declares that all waters within the state from all sources of water supply belong to the public: Section 5715, Or. L. This is, of course, subject to the further provision of the act."

We dare say that the court will read the foregoing sentence to the effect that Section 5715, Oregon Laws,

is a part of the Water Code. But it is not. We quote it from Volume 2, Oregon Laws, page 2318:

> "§ 5715. Water Belongs to Public. All water within the state from all sources of water supply belong to the public. (L. 1909, c. 221, p. 370, § 1; L. O. L. § 6575.)"

The Chapter 221 of the Laws of 1909 of which the foregoing section is a part, was not in existence at the time at which the Water Code went into effect, namely: Upon its being filed in the office of Secretary of State, February 24, 1909. Chapter 221 of the Laws of 1909 contains no emergency clause, and its effective date is governed by Section 28 of Article IV of the Oregon Constitution, set forth at Appendix 35. This makes such an Act take effect at 90 days after the end of the session at which it was passed. The 1909 Legislative Session was held from January 11, 1909 to February 20, 1909, inclusive. So that Section 5715 was not effective until the expiration of eighty-six days after the Water Code became effective.

Section 5715 of Oregon Laws was, as we have shown, Section 1 of Chapter 221 of the 1909 Laws.

That chapter is quoted sufficiently for all purposes here, at the Appendix 70-71. It was an act providing for the granting of franchises of the water powers of the state, and for collecting fees therefor. We do not believe the purpose of the Act was to enable appropriators to take riparian rights that had been destroyed in the Water Code. Nothing came of it. Its Sections 3,

4, 5 and 6 were repealed. (Laws of 1915, page 277).

The decision of the court in the Hood River case did not apply the police power.

If it be contended that the paragraph which we cited above, 114 Oregon, 181, and/or the paragraphs which we cited from page 182, indicate an intention to declare that the state by the exercise of its police power destroyed riparian rights that had not been used prior to the enactment of the Code, we have to say that the position cannot be sustained. As heretofore pointed out in chapter II at pages 32-35 hereof, it was held in the Hood River case that the power company's lands involved therein were acquired from the State of Oregon at a time when

> "the law prevailing in this state authorized an appropriator subject to rights existing at the time of his appropriation, to take water from the streams of the state for a beneficial use, and convey the same to non-riparian land; provided he could legally obtain access to the stream."

The law referred to is, at page 181 of the opinion, said to be the Act of 1864, Hill's Laws, 3832, set forth at the opinion 180. It authorizes miners to make local laws in relation to water rights, possession and working of placer claims, etc., subject to the laws of the United States.

So the court in the Hood River case decided adversely to the power company upon the ground that it had obtained its lands from the state which had at that time

recognized the right to make appropriations thereon.

We quote from the syllabus of the case as follows:

> "21. A power company has no right to a continuous flow of water as riparian owner, where its land belonged to state at time of passage of Section 5715, Or. L., declaring all waters within state to belong to public, but is only entitled to water appropriated under statutes."

Note that the statement in the syllabus is that the lands were acquired from the state; and that at the time of the passage of Section 5715 (1909) the land still belonged to the state.

At any rate, whatever the facts may be, the decision against the power company in the Hood River case rests upon the doctrine that the lands had been acquired from the state at a time when the waters passing through the same were subject to being appropriated for use on non-riparian land.

A casual reading of the majority opinion herein might give the impression that the Appellate Court in using the doctrine of the exercise of the police power might have considered that it was following the state court in its opinion in the Hood River case.

But we believe that this is not borne out upon an examination of that case.

We regard the application of the police power doctrine as a determination upon the part of the Appellate Court that at the time of the passage of the Water Code there abided in petitioner's lands the com-

mon law riparian rights to the use of the waters of Rogue River for which we contend. Otherwise, why apply the extraordinary doctrine of the exercise of the police power.

If, as the opinion in the Hood River case asserts, the State of Oregon recognized and adopted the rule conferring the right of appropriation of water long before it conveyed the lands to the power company's predecessor, and that because of that fact the riparian doctrine did not apply, then there is no question in the decision as to the exercise of the police power.

Under such conditions the doctrine asserted in the paragraphs quoted from pages 181 and 182 of the opinion, were unnecessary to the decision, and did not create a precedent that the Appellate Court should have followed. Under such circumstances it was immaterial whether or not it was within the province of the Legislature of 1909 to define a vested right of a riparian owner. It was immaterial whether under that statute "defining what shall constitute a vested right of a riparian proprietor" the claim of the power company, as an owner of lands on Hood River to a continuous flow of the stream could not be maintained. For according to the decision particularly applying to the rights of the power company, it was determined that it had bought lands which the state had denuded of the riparian right.

Let us draw from the majority opinion herein the conclusion of the court upon this matter, with grounds

upon which the conclusion rests. We quote from the majority opinion at R. 449-450, 73 F. (2d). 568-9:

> "At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian owner to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed; his right of access to and to the equal use of the waters for ordinary domestic purposes were preserved. *Re Water Rights of Hood River,* 114 Or. at 190, 227 Pac. at 1089. This legislation, however, has changed the conditions under which the riparian owner's privilege otherwise to use the water may be exercised. On the one hand, his unrestricted right reasonably to use his fair share of the waters for beneficial purposes is now subordinated to a prior appropriation for beneficial purposes. On the other hand, he is no longer limited in such beneficial use to his fair proportion of the waters over and above those needed for domestic purposes by all riparian owners; and as a riparian owner, he is in a peculiarly advantageous position to exercise the right of appropriation. The statute cannot be said to take away property from one in order to give it to another, even though the effect of the operation of the statute in a specific case may be so to transfer the privilege of making some specific use of the water.
>
> We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been *validly abrogated* by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

The majority opinion concedes that if the act accomplishes the taking of the property, this could not be done without due process of law.

We submit the following case of interest upon this point:

Chicago, Burlington & Quincy R. Co.
vs. People of Illinois,
200 U. S. 561-601,
50 Law Ed. pages 596-612.

This was a contest between drainage commissioners in Illinois and the Chicago, Burlington & Quincy, plaintiff, as to the validity of a demand that the railroad company should remove a bridge, or if it continued to maintain it at the same point, to substitute one that will meet the requirements of the commission, adopted by the commissioners. The proceeding is based in part upon the Drainage Act of Illinois granting certain powers to the commission.

The legal questions involved were concerning the exercise of the police power of the state.

The opinion at 200 U. S. 592 holds that such power embraces regulations designed to promote public convenience, or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. That the validity of such regulation, whether established directly by the state or some public body acting under its sanction, must depend upon the circumstances of the case, and the character of the regulation, whether arbitrary or reasonable, or whether really designed to accomplish a legitimate public purpose.

As to the constitutional requirements of due process

of law where property is taken for public use, the court said: (page 593-4)

> "The constitutional requirement of *due process of law*, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; *Sweet v. Rechel*, 159 U. S. 380, 399, 402, 40 L. ed. 188, 196, 197, 16 Sup. Ct. Rep. 43; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. If the means employed have no real, substantial relation to public objects which government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limita-

> tions upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police *regulations,* although they may interfere with the full enjoyment of private property, and though no compensation is given.' Sedgw. Stat. & Const. Law, 434."

In order to determine whether or not the Water Code is an Act resulting from the use of the police power of the State, we must, in this case, look to the terms and the provisions of the Act. The question of the exercise of the police power was never mentioned in the trial of this cause in the District Court, nor in the hearing thereof upon appeal in the Appellate Court.

The present situation of the case, having been decided upon the doctrine of the exercise of the police power, results, as petitioner believes, from the exercise of the imagination, if we may be pardoned for so saying, of the writer of the opinion in this cause. For, the matter not being in issue below, there was, of course, no evidence introduced in the case tending to show, one way or another, a public necessity for the confiscation of the riparian rights which had not been applied to a beneficial use at the time of the enactment of the code. It would do no good here to enter into a discussion of the

question as to whether there were or not any facts before the 1909 Legislature authorizing the use of the police power of the State to either regulate or take the private property of the riparian prorietor.

In the brief upon the merits in the Deschutes case, there was a discussion by the learned Attorney General of Oregon, upon the great necessity for certain legislation in Oregon respecting the use of the waters of the streams. Foot note R. 417; 73 F. (2) 559.

Whatever may have been the record in that case, there is nothing here that justifies either the petitioner or the respondents, or others who may appear herein, in attempting, ex parte, to submit evidence upon the emergencies that may now be thought to have been presented to the Legislature of 1909.

We are anticipating, because this brief offers petitioner's last opportunity to be heard upon the matter. It is, therefore, extremely difficult to discuss here the question of the exercise of the police power in the enactment of the 1909 Code. In other cases before this court, it has been able to consider external or historical facts leading to the enactment of the law being considered. For a statute to be valid as an exercise of the police power, it must bear a substantial relation to the existing evil, if there be one, and not be a mere attack upon property rights disguised as an exercise of the police power.

The courts are liberal in leaving it to the legislature

to say what the exigencies of the case requiring the exercise of this extraordinary power may be. But here the necessity for the exercise of this power is imaginary. There isn't a syllable in the Act showing an emergency justifying the exercise of the police power of the state upon any question involved in this case. One must look entirely to the emergency clause, which recites no grounds of emergency, except those that referred to the determination of water rights. These are said to be urgent because of the existence of bad blood, etc. But the entire clause refers to a subject with which we are not concerned, viz: the necessity for adjudication proceedings.

How, then, shall we determine that an emergency existed sufficient to justify the state in the exercise of its police power in depriving the petitioner of its vested riparian rights to the use of the waters of the stream? True, we can cite the cases which define the rules whereby this court may determine for itself whether or not the occasion existed for an interference by the state with the possession and use of the property of the individual. But, it is all beside the case, because throughout the Act there is not a syllable nor a clause that justifies the taking of the petitioner's property, or even regulating its use, by the exercise of the police power of the state. In many cases in which the right to the use of the police power is challenged, there have been allegations in the Act, the truth of which were questioned, and

so this court has reserved the judicial power to determine for itself whether the Act is one that is the result of the exercise of the police power. But from what does it determine it? From the declaration of the Act itself. In the absence of such a declaration, it *may have* been possible to have submitted proof to show a condition that may be claimed to have justified the exercise, by the legislature, of this extreme power. But whether this is correct or not, is immaterial in this case.

The Act stands before the court four-square, to be interpreted upon its terms as they are written in the Act.

As a reminder of the nature of this investigation, we submit these few following authorities. If there were facts recited in the Act, or otherwise legally appearing, upon which the court might act, we believe the case would be within the decisions quoted below.

Pierce v. Society of Sisters of Holy Names,
268 U. S. 510, 535; 69 L. ed. 1070, 1078.

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."

As to the position of this court in the consideration of an act containing representations as to the necessity for the exercise of the police power, we submit the following authority:

Lochner v. New York, 198 U. S., 45-76;
49 L. ed. 937. (1905.)

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber,* 136 U. S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman,* 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064."

In the opinion, here, there was cited the case of

Pennsylvania Coal Co. v. Mahon,
260 U. S. 393; 67 L. ed. 322. (1922.)

This suit tested the police power of the State of Pennsylvania to pass the act forbidding mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them, land where the surface is owned by the owner of the underlying coal, and is a distance more than 150 feet from any improved property belonging to any other person.

The coal company contested the validity of the statute upon the ground that it had owned the other lands concerned, and in disposing thereof, had reserved the right to excavate and mine beneath the surface, and to remove the coal. The court said, on the question of police power: "As applied to this case, the statute is admitted to destroy previously existing rights of property and contract. The question is, whether the police power can be stretched so far."

There, the legislature recited the exigencies of the occasion, and the necessity for the exercise of the police power. The court said: The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power. The court said that it was its opinion that the Act could not be sustained as to exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.

The court expressed the rule to be applied in such case. We quote from the U. S. report at 415-416:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston,* 101 U. S. 16, 25 L. ed. 980. In general it is not plain that a

man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & B. R. Co.* 172 Mass. 488, 489, 43 L. R. A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions."

In

Wilkinson vs. Leland,
27 U. S. (2 Pet.) 657-8,
7th Law Ed. 542, (1829).

Mr. Justice Story in passing upon a Rhode Island statute which amounted to a granting of title to a purchaser at an invalid sale from one in whose name the title stood, used this language:

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention. In *Terrett v. Taylor* (9 Cranch, 43), it was

held by this court that a grant or title to lands once made by the Legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative Act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their Legislature the power to devest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine."

While this case was decided in 1829, yet the principles announced in the case were carried into the 14th Amendment to the Federal Constitution, as it is now construed and applied to the rights of personal liberty and of private property.

(17) THE CALIFORNIA CASES

We are induced to make the following discussion because of the prominence given to the subject in the majority opinion here.

The opinion quotes from and cites leading recent decisions of the California court, dealing with this problem of the exercise of the police power of the state in the matter of the power of the state to abrogate vested riparian rights.

We are glad to contribute to this interesting subject in the judicial lore of our country.

We are particularly glad to do so because we believe that the opinions of the California court cited by the Appellate Court, clearly establish petitioner's cause before this Court. It is our contention that these California cases cited will, if applied, be the undoing of the prevailing opinion in the instant case.

1st) The discussion of the subject suggests that the Appellate Court found it necessary, in order to abrogate the vested riparian rights of petitioner, to apply the doctrine of the use of the police power by the state. Otherwise, petitioner would have prevailed in that court.

As heretofore pointed out (Brief pages 32-38), the Oregon decision followed therein was not in point; the use by the Oregon Legislature of the police power for the destruction of riparian rights has never been asserted in any Oregon case. The doctrine was not urged in the Appellate Court nor in the District Court below, as the record will show.

(2) *Herminghaus v. Southern California Edison Co.*, cited at Opinion R. 436, 73 F. (2d) 564, is auth-

ority for our statement that the Water Commission Act of 1913, discussed below, was not an exercise of the police power of the state of California. Yet the Act did protect riparian rights, to some extent, and did fix a limitation within which they should be put to a beneficial use. From the discussion in the Gin Chow case, quoted below, (R. 439, 73 F. (2d) 565, as well as the opinion R. 439-440 and 73 F. (2d), we learn:

That because the California court felt impelled to adhere to the long established rule of *Lux vs. Haggin,* the Amendment to the Constitution of California, adopted in 1928, was made necessary. And, as stated in the Gin Chow case (if we may so designate it), the Amendment is held by the California court to be the exercise of the police power of the state.

California had, in the Commission Act a more elaborate but very similar law to that of the Oregon Water Code. But it did contain the element of notice which is lacking in the Oregon Code. And this is one of the reasons why the Oregon Code should not now have written into it, words that are not there — words that are necessary to justify the announcement that the Code "abrogated" riparian rights which had not been beneficially applied before the enactment of the Code.

In the court's quotation from the Gin Chow case, found at R. 443, Federal page 566, speaking of the Oregon 1909 Water Code, it stated:

> "Thereafter the Legislature adopted a water code limiting the riparian owner to a reasonable

beneficial use. The code was upheld. In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475."

At this point it is interesting to read the interpretation the California court put upon the Willow Creek decision, that the code limited the riparian owner to a reasonable beneficial use. The interpretation so given to the Willow Creek decision has not been that interpretation given by the Oregon courts. We have discussed it elsewhere (Bf. Ch. VII, pp. 130-149). Well might the California court have said that in the Willow Creek case it was decided that vested riparian rights were not *impaired* by the provisions of the Code, and that the decision cited Section 1 of the Code, and Subdivision 1 of Section 70 thereof, to support that holding.

The

California Water Commission Act,
Stats. 1913, page 1012,

after creating the Water Commission and defining its powers, etc., provided for investigation of streams, etc. And Section 11 reads as follows:

"§ 11. Water declared unappropriated. Public Waters. When action for condemnation is pending. Reservoirs may constitute single system. All water or the use of water which has never been appropriated, or which has been heretofore appropriated and which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, or which has not been put, or which has ceased to be put to some useful

or beneficial purpose, or which may hereafter be appropriated and ceased to be put, to the useful or beneficial purpose for which it was appropriated, or which in the future may be appropriated and not be, in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize for the purpose of such appropriation such water or the use of water, is hereby declared to be unappropriated."

Here follows the portion of the section with reference to the water upon lands riparian to the streams, and which contains the ten year clause, and is the portion of the section with which we are particularly concerned:

"Public waters. And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purposes upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such nonapplication shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so nonapplied, unless otherwise appropriated for a useful and beneficial

purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act;"

The above paragraph, "Public waters", apparently divides those waters into two classes for the purposes of appropriation.

1. That all waters flowing in any stream, excepting so far as such waters had been at the time of the enactment, or were then, being applied to useful and beneficial purposes, upon, or in so far as said waters were or may be reasonably needed for useful and beneficial purposes upon lands riparian to such stream, were then and are thereby declared to be public waters and subject to appropriation.

2. If any portion of the waters of any stream *shall* not be put to a useful or beneficial purpose to or upon lands riparian thereto for any continuous period of ten consecutive years after the passage of the Act, such nonapplication shall be deemed to be presumption, that the use of such portions of said waters is not needed upon said riparian lands for any useful or beneficial purpose; that such portion of said nonapplied waters are declared to be in the use of the state, and subject to appropriation, etc.

A comparison of the provisions of the Oregon Water Code with this Commission Act would show this:

That the Oregon Water Code, as construed herein, cut the riparian owner off instantly—destroyed his

riparian rights, if he had not put them to a beneficial use at the time of the enactment. While the California Commission Act seeks to cut off the riparian owner if he fails to make a beneficial use within ten years, and also provides that the riparian use is limited to the quantity of water reasonably required upon the riparian lands. We are advised that the ten year provision has not as yet been passed upon.

> "§ 42 'Water.' 'Useful or beneficial purposes.' The word 'water' in this act shall be construed as embracing the term 'or use of water'; and the term 'or use of water' in this act shall be construed as embracing the word 'water.' Whenever the terms stream, stream system, lake or other body of water or water occurs in this act, such term shall be interpreted to refer only to surface water, and to subterranean streams flowing through known and definite channels. But nothing in this act shall be construed as giving or confirming any right, or title, or interest to or in the corpus of any water; provided, that the term 'useful or beneficial purposes' as used in this act shall not be construed to mean the use in any one year of more than two and one-half acre feet of water per acre in the irrigation or uncultivated areas of land not devoted to cultivated crops."

The following is Section 3 amending Article XIV of the California Constitution, and which was adopted November 6th, 1928:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water

be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained." (Statutes and Amendments of the Codes of California, 1929, Constitution of California LXX-LXXI).

In its discussion of California cases, the majority opinion quoted from the Gin Chow case, as follows: (R. 439-40; 73 F. 2d. 565-6.)

"Plaintiff, however, also urged that as against a non-riparian appropriator, a riparian owner was entitled to insist upon the undimished flow of the stream, no matter how slight both the benefit of such flow and the damage of the threatened diversion might be. The court, conceding that this

was a fair statement of the effect of the previous California decisions, held that this rule had been modified by a constitutional amendment, adopted in 1928, after the Herminghaus and Fall River cases, and that, in consequence, the rule of reasonable use now applied as between riparian owner and non-riparian appropriator. To the contention that the Amendment so interpreted was a violation of the state and federal constitutional guaranties against deprivation of property without compensation, the court answered:

'It was because this court felt impelled to adhere to the long-established rule of *Lux v. Haggin,* that a constitutional amendment was made necessary.* * * *"

The language above quoted connects onto and is a part of the following:

"Upon the adoption of the amendment, it superseded all state laws inconsistent therewith. Const. art. 22, §1; *People v. Kerber,* 152 Cal. 731, 93 P. 878, 125 Am. St. Rep. 93. The amendment is now the supreme law of the state, which the courts are bound to enforce, and it must be made effectual in all cases and as to all rights not protected by other constitutional guarantees."

At paragraph (15), page 17 of the Pacific, the California Court said that:

"The constitutional amendment of 1928 is an exercise of that (police) power."

The majority opinion continues its quotation from the Gin Chow case at R. 441, F. 566, as follows:

"'* * * There is a well recognized and established distinction between a "taking" or "damaging" for public use and the regulation of the use and enjoyment of a property right for the public

> benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned. It is the highest and most solemn expression of the people of the state in behalf of the general welfare. The present and future wellbeing and prosperity of the state depend upon the conservation of its lifegiving waters. * * * ' ' '

It will thus be seen that the California court was unwilling to destroy the riparian rights which had always been recognized in the California court, without the aid of the constitutional Amendment, Section 3, Article XIV, *supra.* And this prompts the inquiry, whether this court will be asked in this case to take a more advanced step than the California court was willing to take under like circumstances.

This brings us to the question:

> WHAT WAS THE CALIFORNIA LAW ON THE RIPARIAN DOCTRINE AT THE TIME OF THE ENACTMENT OF THE WATER COMMISSION STATUTE?

From the language of the Gin Chow case, quoted in the majority opinion, supra, we may fairly assume that

> *Lux v. Haggin,*
> 10 Pac. 674-784,
> 69 Cal. 255 (1886)

referred to in said quotation from the Gin Chow case expressed the California riparian right doctrine as the same existed in that state at the adoption of the Water

Commission Act, and at the time of the decision in the Gin Chow case. The riparian doctrine as announced in that case is contained in the quotation which we make therefrom at Appendix 96-97. It is therein shown that the riparian proprietor's right to have the stream run through his land is a vested right, and interference therewith imports damages. The attributes of such a right are those announced in the Weiss case in the Oregon court, and in the earlier Oregon cases. The two cases were decided in the same year, the Weiss case in April, 1886, and Lux vs. Haggin in June of that year.

We have quoted at length from the Weiss case at Appendix 52-56. It is the doctrine of the continuous flow, undiminished in quantity or quality, except such changes as may result from the use of other riparian users.

The California doctrine came through the statute of April 13th, 1850.

We quote from

Lux vs. Haggin, supra:

Quotation from 10 Pac. Rep. 721:

> "It may be maintained, at least plausibly, that the admission of California into the Union 'on an equal footing with the original states' of itself operated an immediate transfer of the property in the innavigable rivers to the federal government, so that the property of the state was momentary. However this may be, on the thirteenth of April, 1850, the legislature of California had

passed an act 'adopting the common law,' which reads:

'The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state.' St. 1850, p. 219."

Compare the California statute under which it acquired the common law riparian doctrine with the territorial statute under which Oregon accepted the principles of the common law. We have quoted from this court and from the Oregon Court upon this subject at Appendix 46-7.

To this please add the following citation made in the Hood River case at 114th Oregon, 166:

"The territorial law of Oregon, passed June 27, 1844, contained this provision:

'The Common Law of England and principles of equity, not modified by the statutes of Iowa or of this government, not incompatible with its principles, shall constitute a part of the law of this land.' Laws of Oregon, 1843-49, p. 100.

Article XVIII, Section 7, of the Constitution of Oregon provides 'That all laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.' See *Perry v. Fletcher*, 93 Or. 43, 52 (182 Pac. 143); *Wright v. Wimberly*, 94 Or. 1, 37, (184 Pac. 740)."

Section 2 of Article 1 of the Organic Law of the Provisional Government of Oregon was continued in force by Section 7 of Article XVIII of the Oregon Constitu-

tion, adopted September 18th, 1857, preparatory to the admission into statehood. (Appx. 47.)

It was urged in *Lux vs. Haggin* that the common law doctrine was contrary to the policy of the state. Upon that question we quote from the decision as printed at page 702-3 of the 10th Pacific:

> "But the policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws. * * * *
>
> If the law is settled, we cannot override the established rule to secure some conjectual advantage to a greater number. If, however, we were permitted to do this, the inquiry would still remain whether the recognition of a doctrine of appropriation (such as is contended for by respondent) would secure the greatest good to the greatest number. Observe, if that be the true rule, the appropriator does not necessarily act as the agent of the state, employing the power of eminent domain for the benefit of the public, but by his appropriation makes the running water his own, subect only to the trust that he shall employ it for some useful purpose. It would hardly be contended that while he continues to use it for a useful purpose, a statute would be valid which should take it from him, without indemnification, under a pretext of regulating the 'common use' of the water more profitably, or of providing for its distribution so as to benefit a greater number of persons. He would have a vested right to the use of the water, although the riparian proprietors would have none. If, indeed, one who has appropriated the water of a stream since the adoption of the present constitution has appropriated it 'for sale, rental, or distribution' to others, the rates he may charge con-

> sumers must be fixed by local authority. Const. art. 14, § 1. But if he shall consume the water himself, one may thus, for his own benefit, arbitrarily deprive many of an advantage which, whether technically private property or not, is of great value, and thus secure to himself that which, by every definition, is a species of private property in him."

Lux vs. Haggin is the leading case upon the subject of the riparian right.

Under the law of Kentucky, Oregon and California, and many other states, ownership of the bed of a non-navigable stream is recognized as fully as the ownership of the land bordering thereon, or the power plant through which the water flows.

In *United States vs. Kress* and *United States vs. Kelly,* decided in this court in the October Term, 1916, the court was dealing with the impairment of the riparian right to the extent of destroying the power of the mill dam that was essential to the value of the mill. In determining the rights of the respective parties, this court used the authority of *Lux vs. Haggin*, citing it with many other cases in the following language:

> *United States vs. Kress and United States vs. Kelly,*
> 243 U. S. 316,
> 61 Law Edition, 746,

quoting from the United States Report at page 330:

> "Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the milldam unobstructed, except as in

the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. *Gardner v. Newburgh,* 2 Johns. Ch. 162, 166, 7 Am. Dec. 526; *Tyler vs. Wilkinson,* 4 Mason, 397, Fed. Cas. No. 14,312; *Johnson v. Jordan,* 2 Met. 234, 239, 37 Am. Dec. 85; *Wadsworth v. Tillotson,* 15 Conn. 366, 373, 39 Am. Dec. 391; *Parker v. Griswold,* 17 Conn. 288, 299, 42 Am. Dec. 739; *Harding v. Stamford Water Co.,* 41 Conn. 87, 92; *Holsman v. Boiling Spring Bleaching Co.,* 14 N. J. Eq. 335, 343; *Beach v. Sterling Iron & Zinc Co.,* 54 N.J. Eq. 65, 73, 33 Atl. 286; *Scriver v. Smith,* 100 N. Y. 471, 480, 53 Am. Rep. 224, 3 N. E. 675; *Crook v. Hewitt,* 4 Wash. 749, 754, 31 Pac. 28; *Rigney v. Tacoma Light & Water Co.,* 9 Wash. 576, 583, 26 L. R. A. 425, 38 Pac. 147; *Benton v. Johncox,* 17 Wash. 277, 281, 39 L. R. A. 107, 61 Am. St. Rep. 912, 49 Pac. 495; *Lux v. Haggin,* 69 Cal. 255, 390, 10 Pac. 674; *Hargrave v. Cook,* 108 Cal. 72, 77, 30 L. R. A. 390, 41 Pac. 18; *Pine v. New York,* 103 Fed. 337, 339, 50 C. C. A. 145, 112 Fed. 98, 103; *Wood v. Waud,* 3 Exch. 748, 775, 154 Eng. Reprint, 1047, 18 L. J. Exch. N. S. 305, 13 Jur. 472, 10 Eng. Rul. Cas. 226; *Dickinson v. Grand Junction Canal Co.,* 7 Exch. 282, 299, 155 Eng. Reprint, 953, 21 L. J. Exch. N. S. 241, 16 Jur. 200; *Stokoe v. Singers,* 8 El. & Bl. 31, 36, 120 Eng. Reprint, 12, 26 L. J. Q. B. N. S. 257, 3 Jur. N. S. 1256, 5 Week. Rep. 756 (Erie, J.)."

This case as concerns the Federal Constitution is in line with *Logan vs. Spaulding Logging Company, supra,* as it concerns Section 4 of Article XI of the Oregon Constitution (Brief pages 121-2).

All of the courts that have dealt with the riparian right have recognized it to be property. As the Circuit Court for the District of Oregon said in speaking of

the Oregon law upon the subject in November, 1910, in

Eastern Oregon Land Co. vs. Willow River Land & Irr. Co.,
187 Fed. 468:

> "The general doctrine of riparian rights is too firmly established in this state to be shaken now by judicial decision. It is useless to cite authorities. (3) The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him, and this may, under some circumstances, include flood or overflow waters reasonably to be anticipated during ordinary seasons. *Miller & Lux v. Madera Canal & Ir. Co.,* 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391; *Miller v. Bay Cities Water Co.,* 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772."

This language was quoted by the Oregon court with approval and passed on to this court for consideration in *Pacific Livestock Co. vs. Lewis* and in Re Willow Creek, 74 Ore. 625.

In the Water Commission Act of California there were plain, definite statements whereby the use of the riparian rights were regulated, limited and under certain circumstances, liable to be taken by the right of appropriation. In that statute there was something definite that might be said as to the impairment or abrogation of the riparian right. But here we have an Act accomplishing, according to its terms, three things:

(1) To allow appropriations subject to existing rights;

(2) To adjudicate and determine rights, and

(3) To regulate the rights determined and adjudicated.

There is no provision for regulating or terminating riparian rights, which as the Oregon court has said, came to the owner with the land. Their attributes are well known; there is nothing about them to adjudicate; they are acquired when the land is acquired; they are not lost by nonuser, but only by the owner's grant, or by adverse possession for the period of prescription. They are like a piece of land with valuable stone cliffs upon it. They stand there as nature created them. If the public requires the stone for public use it might condemn; if it desires to regulate the handling of the stone it could doubtless do that. But there it stands as property, and while it may be taken for the public good, it cannot be legally taken by a private corporation from its owner, and for its sole selfish benefit. There is nothing in the Act that says this may be done, and such an extraordinary privilege is certainly not to be read into the Act.

The majority opinion in the instant case quoted from

Fall River Valley Irrigation Dist. vs. Mt. Shasta Power Corp.
202 Cal. 56,
259 Pac. 444 (1927).

This is a 1927 decision of the California court, rendered the year before the adoption of the California constitutional Amendment, supra. In addition to the

quotation made in the majority opinion at R. 438, F. Rep. 585, we add the quotation set forth at Appendix 77-8.

Briefly the court said that it had re-examined the nature of the riparian right, and was satisfied with its previous announcement. That

> "we, therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse" etc.

That the right to the use of the water of the stream was under the same protection at the hands of the law as any other vested right.

And this, notwithstanding the provisions of the Water Commission statute.

The case of

Herminghaus v. Southern California Edison Co.,
252 Pac. Rep. 607-627,
200 Cal. 81 (1926),
cited in the majority opinion (R. 436. F. 564),

was decided in the year 1926 without the aid of the constitutional Amendment, and it construed the Commission Act.

The decision presents a most complete review of the California water right cases. A reading of the decision leaves no room to doubt that the California court adhered to the riparian doctrine substantially as announced in *Lux vs. Haggin*. The case is authority for the following propositions of law, applicable in California in 1926:

That riparian owners are entitled to the reasonable use of the waters at all seasons, having a vested right to the usufruct of the flowing streams in the usual and ordinary course of their flow.

That riparian owners as against appropriators need not limit the natural flow of the streams by artificial appliances;

That the upper riparian proprietor may use the waters of the stream for power;

That an appropriation made under the California statute divests no private rights, but merely gives preference over subsequent appropriators.

That Section 11, of the Water Commission Act, declaring waters public waters, is inapplicable to waters beneficially used by a riparian owner.

That Sections 11 and 42 of the Water Commission Act construing the term "useful and beneficial purposes" are held *not* within the police power of the state.

If the Water Commission Act is not within the police power, it will be difficult to put the Oregon Water Code as an Act under the police power of the state.

So far as the question involved here, namely: the destruction of our vested riparian rights, is concerned, the court in the Herminghaus case, and in a review of the previous California decisions, made this quotation:

252 Pacific Reporter at page 615:

"But the riparian owners have a right to have the stream flow past their land in its usual course,

and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.' Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others."

The opinion in the Gin Chow case, supra, was written by Mr. Justice Shenk. And because he is the author of the latest decision in the Supreme Court of California on the effect of its 1928 Constitutional Amendment, and which we shall presently cite, we will briefly rewiew the case to show the history leading to the adoption of the Amendment.

This whole situation impresses one that by a comparison of the legislative enactments and the decisions

of the courts of Oregon and California, there is no possible legal basis for a holding that the Oregon Water Code, so far as pertains to the question here, is an exercise of the police power of the state, intended and designed to destroy the riparian vested right.

The opinion in the Gin Chow case, beginning with paragraph 9, page 13, 22 P. (2d), traces the California history of this riparian question from the adoption of Section 4468 of the Political Code, 1850, down to and including the adoption of the Constitutional Amendment in 1928.

After quoting the statute, the opinion states:

> "This language is general in its terms. It does not mention the law of riparian rights, but has been held to include it by necessary implication."

(This is the Oregon case exactly).

The opinion continues:

The English law of riparian rights was applied in the state in 1886 in *Lux vs. Haggin*, wherein it was declared that the common law right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil; passes with it, not as an easement, or an appurtenant, but as part and parcel of it. Use does not create nor disuse destroy the right. It extends to the natural flow of all the water, unless diminished by reasonable application by other riparian owners, etc. That the doctrine had been affirmed and reaffirmed consistently since the decision. In other words,

"It is the established law of this state, that as

> between riparian proprietors the right of each as against the other is confined and restricted to the amount of water reasonably necessary for useful and beneficial riparian purposes."

but that the reasonable use does not apply as between the riparian and the appropriator.

Then the court cites the California authorities holding that position, stating that since *Lux vs. Haggin*, in controversies between *riparian* owners and *appropriators* the doctrine of reasonable use *does not apply*, citing *Miller vs. Lux et al.* It is stated, if any doubt ever existed upon this point, none can now remain since the decision of the court in

Annaheim Union Water Co. vs. Fuller,
150 Cal. 327,
88 Pac. 978,
11 L. R. A. (N.S.) 1062.

That neither court nor legislature has a right to say that because such water may be more beneficially used *by others* it may freely be taken by them. It quotes that, public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. It discusses the Herminghaus case.

It recites that in 1932 the Legislature sought to avoid the rule adhered to by that court *by adopting* the Water Commission Act of 1913, and incorporating therein Section 11, which provided that stream waters of the state not theretofore put to beneficial use or reason-

ably needed for beneficial purposes, should be deemed public waters, and subject to appropriation; and that Section 42 sought to place a limit on the amount of water which should be deemed, (per acre), a reasonable and beneficial use; that under Section 15 the Commission was vested with power to declare what waters in the state were unappropriated.

Note that this is all *regulation*, with powers almost permitting confiscation.

It then cites

Tulare Water Co. vs. State Water Com.,
187 Cal. 533,
202 Pac. 874

in which it was held that Section 15 was an unlawful delegation of judiciary power to the Commission; that in the Herminghaus case the effect of the decision was that it was beyond the constitutional power of the Legislature to assume the *"right to determine"* what are useful and beneficial purposes to which private property—riparian right—might be put; that the right thus attempted to be interfered with was declared to be a vested right, protected by an unbroken line of cases since *Lux vs. Haggin*, which established a rule of property which was *beyond the power of the legislative* department to disturb.

It then discusses the *Fall River Irrigation District case, supra*, and says:

> "We are now confronted with the question whether the law of riparian rights in this state

must be modified to conform to a direct and positive constitutional declaration."

That immediately following the decision in Herminghaus, December, 1926, the Legislature in 1927 proposed the Amendment, and it was adopted November 6, 1928. (It is there quoted). It then states that it was because the court felt impelled to adhere to the long-established rule in *Lux vs. Haggin* "that a constitutional amendment was made necessary." It recited that there was a well recognized and established distinction *between taking or damaging for public use, and* the *regulation of the use* and enjoyment of a property right for the public benefit; that the former falls within the *realm of eminent domain*, and the latter within the *sphere of police power*, and that the amendment is a legitimate exercise of the police power.

The opinion stated that it was contended that the constitutional amendment was too indefinite to be effective; that the amendment uses the words "reasonable" and "unreasonable" without the statement of any facts, which if existing, would constitute reasonableness or unreasonableness; that objection was made in the Herminghaus case to the terms of Section 42 purporting to define the amount of water per acre that would be deemed useful and beneficial; that the objection was *sustained* on the ground that it was beyond the power of the legislature so to provide, and that

"the extent to which such riparian landowners need and use and are entitled to have the benefit

of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case."

That what is or is not a reasonable use is a *judicial question.*

The most recent California case on the Amendment is

Peabody vs. City of Vallejo,
89 Calif. Decisions, 165.

It will be reported at 40 Pac. (2d). 486.

It is not reported and quotations must be made from California Decisions.

The opinion is by Mr. Justice Shenk, author of the opinion in the Gin Chow case. The suit, so far as it interests us here, involved a controversy between appropriators and riparian proprietors, and the right of injunction for the preservation of the riparian right. It seems to seek to defend the application of the constitutional Amendment by stating what the court believes has been accomplished along similar lines in other western states. Of these it states, (89 C. D. 172):

"That nine *now* recognize the modified doctrine of riparian rights, and that eight have entirely *abrogated* the doctrine of riparian rights. The nine with the modified doctrine are said to include Oregon and California; the eight that have abrogated it include *Colorado,* which it seems to us never did have the riparian doc-

trine, but that the common law doctrine was rejected by that state.

But as to Oregon, unless we include the doctrine of the Hood River case, it has always had the common law riparian doctrine, except as modified by *prior* appropriation.

Speaking of the application of the constitutional Amendment the court said, quoting from page 178 of the California Decisions:

> "(5) There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, the owner of an underground and percolating water right, and the *prior* appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the *subsequent* right, the owner is entitled to a judgment declaring his *preferential* and *paramount right* and *enjoining* the *assertion* of *an adverse use which might otherwise ripen into a prescriptive right.* (*San Bernadino v. Riveside, supra.*) If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable. (*Modoc L. & L. S. Co. v. Booth, supra; Holmes v. Snow Mountain W. & P. Co.*, 36 Cal. App. 394; *Stratton v. Mt. Hermon Boy's School*, 216 *Mass.* 83, *except to establish priority.* This is but another way of saying that the appropriator may use the stream surface or underground, or percolating water, *so long as the land having the paramount right* is not materially damaged. Any use by an appropriator which

causes substantial damage thereto, taking into consideration *all of the present and reasonably prospective recognized uses,* is an impairment of the right *for which compensation must be made either* in *money* or *in kind,* and in the event public use has not attached the owner of the paramount right is entitled to injunctive relief."

The conclusion reached is stated at page 183. We quote it in so far as it is of interest here:

"We therefore conclude: 1. That the rule of reasonable use as enjoined by section 3 of article XIV of the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying landowner, or the percolating water right, or the appropriative right.

2. That the test of reasonable use as so enjoined was not applied to the facts in the present action and the judgment should be reversed, and the cause remanded for trial *as a condemnation action.*"

We make these deductions from the California decisions considered:

That the California court did not consider it within the powers of the legislature by any act to destroy the vested riparian right except to take the same for public use by due process of law and, of course, upon compensation paid.

That desiring to accomplish a regulation of waters used or useable, both by appropriation and through the riparian right, California adopted its Constitu-

tional Amendment, intending to bring the same into harmony with the provisions of the Federal Constitution. True, in doing this, the Amendment seems to have dealt quite freely with the property of the riparian proprietor, to the extent that this amounts to a regulation and yet preserves the right to use the water beneficially.

But from it all we seem to learn this lesson:

That vested riparian rights cannot be destroyed constitutionally without the consent of the owner; that no policy of the state adopted subsequent to the acquisition of the riparian right, can give the state any power to confiscate or to take it from one person and turn it over to another.

We have no concern with the California situation. What may ultimately be the result thereof is immaterial here. We are seeking only to prevent another riparian owner across the stream, from destroying the stream, and stream bed, in which it and we have common rights and common use, and to protect our rights by decree.

But if the State of California, through the able court which it has, finds itself unwilling to confiscate a vested riparian right by either act of its Legislature or constitutional amendment, and this seems to be the case, we maintain, and with all due respect, that the majority opinion went far afield when it held that the Oregon Water Code has "validly abrogated," through

the exercise of police power, the petitioner's riparian right. It seems unthinkable that this could be done without notice; without opportunity to be heard; without a consideration of what use petitioner might seek to make of this right, and that a legislative act, bearing the emergency clause to put it into immediate effect, could thus destroy so important and valuable a property, and do it constitutionally.

CHAPTER XVI

(18) THE REMEDY AND ITS EFFECT

Petitioner believes that to protect its rights it will be necessary to permanently maintain the injunction now in force, restraining further dynamiting in the river bed, the removal of shattered rock from the dynamited area, and preventing respondents from impairing petitioner's vested riparian rights in the stream; and to direct a decree confirming and declaring petitioner's said riparian rights, and adjudging the same to be unaffected by the Desert Land Act. Also to reverse the decree and judgment of the District Court, and its judgment for costs, and to grant petitioner affirmative relief, as aforesaid, together with its costs.

(19) EFFECT OF SUCH DECREE

The protecting of petitioner's rights does not require the holding of the Water Code to be an unconstitutional Act. In fact, as written, but not as construed, it is a wholesome and constitutional Act.

The granting of petitioner's relief will not undo nor affect adjudications that have been had under the Act.

True, the rights of claimants have in some of the adjudication proceedings been construed as appropriations. Among these are the claims of the Power Company in the Hood River case, supra, and the Deschutes Company in the Deschutes adjudication, supra, also the Leonard rights in the Sucker Creek adjudication, supra, etc.

(20) THE QUESTION INVOLVED HERE WAS NEVER DECIDED BY THE OREGON COURT.

But the question involved here has not been decided in any of these cases, nor in any adjudication so far as we know.

As suggested in the dissenting opinion, this is not a case between a power company and an upper irrigation company, as in the Hood River case.

But it stands alone in presenting the question (and for the first time) of the right of an intending appropriator, depending upon water permits issued under the Act, to take and appropriate the water held under a riparian right, vested prior to the passage of the Water Code. In other words, whether the Water Code empowered the State Engineer to issue permits carrying such extraordinary power, and so far reaching in its consequences; whether or not the language of Section 1 of the Act is to be abrogated. It provides that appropriations can only be made subject to the terms of the Act, and subject to existing rights; that nothing therein shall be so construed as to take away or impair the vested right of any person, firm, etc., to any water. It presents the question as to whether or not each permit issued must be issued subject to the then existing riparian rights.

PETITIONER MAINTAINS:

That this question was not decided nor presented in the Hood River case, nor in any other case in

which the Oregon Court construed the Water Code.

Herein we have referred to the language in the Hood River case, holding that the Code had defined a vested riparian right, as dictum. Perhaps this is too strong a statement. If the decision in the Hood River case as to the rights of the power company is put upon *two* grounds, we presume that the decision upon *both grounds* would be stare decisis, *so far as the power company is concerned.* But in fact, the decision was upon the ground that the state had, while it owned the land, and prior to its transfer, maintained the policy that appropriations could be made adverse to the riparian rights. And so, as stated in the syllabus of the case, the lands had no riparian rights when the power company acquired the same.

But be that as it may, we think this Court has the right to disregard the portions of the Hood River opinion which we mentioned as dictum, in considering whether an Oregon Court had really so construed Subdivision 2 of Section 70 of the Code, *as to make an adjudication thereon,* namely:

That rights not beneficially used before the enactment were abrogated (to use the language of the Appellate Court), when in fact the decision of the question was not necessary to the decision in the Hood River case. The question is pressed harder upon us from the fact that the so-called dictum cannot be found in the Water Code; from the fact that there is not a syllable

in the Code upon the subject, and hence, no construction to that effect could be made, nor could it be material in the Hood River case.

But the question here was not a question in the Hood River case, namely:

The right of petitioner's neighbor across the stream, itself a riparian proprietor, to confiscate, on the authority alone of the Engineer's permits, petitioner's vested rights which existed before the enactment of the Code under which the permits were issued.

To accomplish this purpose would require eminent domain proceedings. These would require, of course, the due process of law, and the payment of compensation. Under the Oregon Constitution, Section 4, Article XI, supra, (Brief page 121), no person's property shall be taken by any corporation under authority of law, without compensation being first made or secured in such manner as may be prescribed by law. And as we suggest in a subsequent chapter XVII, when this construction of the Water Code shall have permitted the illegal "abrogation" of petitioner's riparian rights, may petitioner not again, under the eminent domain provisions of the 1909 Statute, heretofore cited, condemn this property—these water rights—and take them back and use them for its lawful purposes of operating its stand-by plant for the maintenance of its better service to consumers.

(21) THE SOLUTION SUGGESTED IN THE DISSENTING OPINION.

We refer to the portion of the opinion at R. 477-8, 73 F. (2d) 576-7.

The suggestion of granting an injunction unless the respondents file a disclaimer to one-half of the water, etc., is subject to these qualifications:

That petitioner does desire to construct its stand-by plant, but that in order to obtain its portion of the water it must first repair the damage which will have resulted from the removal of the portion of the river bed shattered by the dynamite, and, doubtless, at a considerable cost.

Then too, the petitioner is entitled to have a decree as prayed for, which would confirm its riparian rights and declare them unaffected by the Desert Land Act.

In

Jones vs. Conn.
39 Ore. 30, at page 39,
(64 P. 855; 65 P. 1068, 53 Cent. Law Jour. 128).

it is said that the only thing necessary to entitle the riparian proprietor to his riparian rights, is to show that his land borders upon the stream; that this shown, he is entitled, under the law to the right to the use of the waters subject only to the rights of other riparian proprietors on the stream. So that the allegation of petitioner's Complaint, that its lands so border on the stream, is an allegation of its said riparian rights.

This allegation found in paragraph V of the Bill of Complaint (R. 7-8), admitted in the respondent's Answer by paragraph VI (R. 23), is a sufficient allegation and admission of the status of petitioner's rights to entitle it to such decree under its prayer in its Complaint to that effect (R. 16).

In

Peabody vs. City of Vallejo, supra,

(quoted at page 236 hereof), the Supreme Court of California in a decision rendered subsequent to the decision in this case, construed the California Constitutional Amendment to this effect:

That there should be no endeavor to take from a water right the protection to which it is justly entitled; that the preferential and paramount right of the riparian owner, and the prior appropriation of an appropriator, are entitled to the protection of the courts of law and equity; that where there is no substantial infringement upon a right, the owner thereof is entitled to a judgment "*declaring his preferential and paramount right,* and to enjoin the assertion of an adverse use which might ripen into a prescriptive right." That any use by an appropriator causing substantial damage to such right, taking into consideration all of the *present and the reasonable prospective recognized uses,* is an impairment of the right, for which compensation must be made, etc., and authorizing injunctive relief.

Upon this subject we also refer to our chapter XXIII on the subject of "Injunctive Relief."

If a law is to regulate the use of water under the riparian right, then, to say the least, the regulation must be upon notice, and an opportunity to be heard, and to show that the right is necessary to the claimant's purposes, but that the time may not be ripe for the making of such use.

For instance, power rights, such as these, must, in good business, be acquired in advance of the necessity for their use. The actual use may need to await the public demand for the power. In fact, compliance with the requirements imposed upon a utility furnishing the power, make it necessary to be "fore-handed," (to take the word from the majority opinion), and acquire the rights in advance of the demand for the power to be made from the use thereof. A proper regulatory tribunal could hear the proof upon these matters, and orderly determine, in the interest of the public, the time within which such rights should be so used. But when they are acquired by a utility with public service powers and obligations, and acquired for the utility's purposes, they are legally *dedicated to the public use.* Eminent domain may be exercised to acquire land upon which to erect the works, or for lands and facilities upon which to transmit the power when necessary for this public use.

In 1926 petitioner sought to build and was ready to build, its stand-by plant.

It is no lack of electricity that causes the Cement Company to desire to manufacture, rather than to purchase from a utility, the power which it requires. No such claim exists here.

A decision that the Cement Company could confiscate, through its permits, petitioner's rights, would only open the way for the condemnation of them from this private corporation, or cause petitioner to otherwise supply its demands from other sources.

A decree which would permit the Cement Company to excavate the shattered material in the river bed would, of course, necessarily have to protect the petitioner's riparian rights.

In this depression, when the demand for power is greatly reduced by the closing of the principal industries supplied by the utility, namely, the saw mills, an exact date as to when the petitioner would require its portion of the water, cannot be fixed. And this is the nature of the riparian right.

CHAPTER XVII

(22) PROPERTY DEVOTED TO AND HELD FOR A PUBLIC USE CANNOT BE TAKEN FOR ANOTHER PUBLIC USE INCONSISTENT WITH THE PUBLIC USE TO WHICH THE PROPERTY IS ALREADY DEVOTED.

The effect of the decree herein is as stated in the dissenting opinion, to take the property from this public service corporation, which holds it for its public uses, and to transfer it to the Cement Company, a private corporation, and without compensation.

There is no case in the Oregon Court construing the Water Code as having the power to accomplish such a result.

The dictum in the Hood River case concerning the legislative definition of a vested riparian right does not reach the case.

It was not contemplated by the Legislature that property acquired or held for a public use could be so taken for private use.

In fact, Section 72, *Eminent Domain,* grants the right to condemn property for a public use of the waters of the Oregon streams.

Chapter 75, Section 3, page 133 of the Laws of said year 1909, (quoted at Brief pages 156-8), provides that public service electric corporations, such as petitioner, may condemn riparian rights and other property for

such public utility service as that in which the petitioner is engaged.

Considering the purpose and policy of the Legislature in the Water Code enactment, it may be safely said that it did not intend to obstruct public service and use of the waters of the Oregon streams, nor to turn the same over to a private corporation to be by it taken and used adversely to the public use.

The Appellate Court in

Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho,
111 Fed. Rep. 842,
49 C. C. A. 633, (1901)

held that the rule is supported by abundant authority that property dedicated to public use cannot be taken for another *public use.* To authorize a second condemnation there must be express legislative authority. This case was followed in a decision in the Tenth Circuit in 1930 in the case following. We make the quotation from this later case, thereby obtaining the doctrine of the two cases in the one quotation:

Clarke et al v. Boysen et al, and nine other cases.
Nos. 40-48, 165.

Circuit Court of Appeals, Tenth Circuit,
February 17, 1930.
39 Fed. Rep. (2nd), 800-822.

Quotation from page 816:

"(19,20) The general rule is that property already devoted to a public use cannot be taken for another public use under the power of eminent do-

main, where the latter taking will totally destroy or materially interfere with the first use. *C., R. I. & P. Ry. Co. v. Williams* (C. C. Kan.) 148 F. 442; *C., M. & St. P. Ry. v. Nation* (D. C. Iowa) 237 F. 709; 20 C. J., p. 602, § 90. On the other hand, under general statutory authority, property already devoted to one public use may be condemned for another public use, under the power of eminent domain, where the latter taking will not materially impair or interfere with or is not inconsistent with the use for which the land was first appropriated. *Pacific Postal Tel. Cable Co. v. Ore. & C. R. Co.* (C. C. Or.) 163 F. 967; *Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Ida.* (C. C. A. 9) 111 F. 842; 20 C. J., p. 605, § 91."

Certiorari denied. 282 U. S. 869, 870, 75 Law. Ed. 768.

The reason for the rule, which is, as we think, universal, that property taken or held for one public use cannot be taken away for another public use inconsistent therewith except by express authority, is this: that the corporation from which the property is thus taken can condemn the property for its public use, and so on indefinitely.

That this is the general rule, see

3 Cook on Corporations,
5th Eddition, § 906.

Each of the State Engineer's permits which the Cement Company is using as the basis of its right to destroy the river bed, and petitioner's right in the stream, was in the first instance issued to respondent City, and by it sold to the Cement Company in the agreement between the parties of October 19th, 1926, a copy of which

is Exhibit A to the joint Answer of respondents (R. 38). The permits are described severally under subdivisions (b) and (c) of paragraph 3, (R. 40-41).

The City's ownership of the 220 second-feet right of "Oregon Water & Power Co." on respondents' side of the river was also so sold (subdivision (a) of paragraph 3, (R. 39); also the McClure right for 75 second-feet on petitioner's side of the river, subdivision (d) of paragraph 3, (R. 41). Admitting the 220 s. f. right runs naturally into the site of the power plant, and with its head will manufacture more than twice the power required for the City's use. (References cited at Brief chapter XIX).

(23) PETITIONER COULD CONDEMN THE WATER RIGHTS AFTER THE CEMENT COMPANY CONFISCATED AND APPROPRIATED THE SAME TO ITS OWN USE.

The Cement Company might insist, of course, on the petitioner paying the $40,000.00 value, which the petitioner offered to the City, and thereby make a profit over the $22,500.00 which the Cement Company is paying to the respondent City. The petitioner would have to restore the river bed at great cost.

Can authority be found for such vain and useless procedure?

CHAPTER XVIII

The depredations in the river bed, and which are enjoined herein, were, as the Cement Company admits, done entirely upon its own responsibility, independent of that of the City. Its sole reason, if any, for believing that it had a right to dynamite the river bed, and remove the shattered rock therefrom, is to be found in permits to appropriate water, issued by the State Engineer of Oregon under the Water Code. They are not vested rights, nor any rights at all. They are not completed permits; they have not been formally granted. In other words, they have not taken the form of the certificate issued under the Code at the time when the holder becomes entitled to the use of the water. They are in their present condition mere licenses or options, which may never be completed.

To this effect are such permits described by this Court in *Wyoming vs. Colorado.*

We cite authorities under the following title:

(24) STATE ENGINEER'S PERMITS

These are not adjudications, but mere licenses to appropriate. As to many, nothing ever is done under them by the intending appropriators. In such case there is no appropriation; and even in others the amount of the appropriation turns on what is actually done under the permits.

Wyoming v. Colorado, 259 U. S. 419-496; 42 Sup. Ct. 552; 66 Law Ed. 999, 1023.

"In fact and in law they are not adjudications, but mere licenses to appropriate, if the requisite amount of water be there. As to many nothing ever is done under them by the intending appropriators. In such cases there is no appropriation; and even in others the amount of the appropriation turns on what is actually done under the permit."

The Supreme Court of Idaho in

Washington State Sugar Co. v. Goodrich, 147 Pac. 1073, 1076 (Supreme Court of Idaho, April 28, 1915)

construed such a permit as a mere declaration of intention to create a water right which may never be anything more than an intention.

In

Bassinger v. Taylor, 164 Pac. 522-528, (Supreme Court of Idaho, April 3, 1917),

the Supreme Court of Idaho said:

That the issue presented in that case by the cross-complaint therein is the ownership of a water right, and on this issue the holding of a permit from the State Engineer has no probative force. It is not a water right, and the Idaho Court has held that it is not an appropriation.

Again, in

Marshall v. Niagara Springs Orchard Co., 125 Pac. Rep. 208-213 (Supreme Court of Idaho, June 8, 1912),

the Idaho Court denied the right of an appropriator to enter upon patented lands for the purpose of surveying, saying that the purpose was for the making of maps,

surveys and plans on an application to appropriate the water under such permits, and that the entry is a trespass.

Other Idaho cases are quoted at Appx. 62-3.

We cite

Talbot vs. Joseph, 79 Ore. 308,
155 Pac. 184.
(79 Ore. at 318):

Here the Oregon Court enjoined the defendants from entering upon plaintiff's land for the making of an appropriation. The opinion quotes Section 1 of the Water Code stating that the section does not give the right to private individuals to invade the premises of another for the purpose of diverting water from a stream; that it is only by power of eminent domain, which has never been granted to an individual for private purposes, that such a prerogative can be exercised, and then only for public use.

CHAPTER XIX

There are not many material facts in issue in this cause. Such facts as were issuable are plainly determined in the record, and are readily ascertained by record references given, so that the court will not be burdened with any labor because of such issues.

We have heretofore, particularly in the Statement of the Case, pointed out the facts concerning the dynamiting of the river by the Cement Company (Brief, pages 15-25); the purpose of that dynamiting, showing that it was to create a deep channel in the bed of the Rogue River sufficiently long, wide and deep to draw into the river all of the water at the ordinary stage thereof, and twice the amount normally flowing there at low water (Appx. 122-3-4-5). That it was the intention of the Cement Company to remove the shattered rock from the river bed, and thus draw the water from petitioner's land, and that this it would do unless restrained; that it was in the act of removing it when enjoined herein (Ans. XII, R. 24-5); that the Cement Company intended to leave enough water on petitioner's side of the stream to make a fishway required by the Oregon law to be left on the installation of such power plants (Brief, page 30); that it would leave that much water because it had to do so, thus using petitioner's lands for its own conveniences. These and other facts have been recited with record references.

We will, therefore, here set out only such additional facts, with references, as we believe will serve to aid the court in its investigation.

(25) THE CEMENT COMPANY IS THE RESPONDENT IN INTEREST.

October 19, 1926, respondent City sold its riparian lands and the 220-second feet right, and the McClure right for 75 second-feet to the Cement Company, for a consideration of $22,500.00. The subject is treated at Appendix 115-17. Exhibit "A" to respondents' Answer (R. 38) is the contract of sale and purchase.

Such a contract in Oregon is construed and held to make the Cement Company the owner of the equitable interest, leaving the City to hold the legal title as security for the unpaid portion of the purchase price. To this effect is:

Sievers v. Brown,
34 Oregon 454, 456,
(56 Pac. 171), (1899).

Quillen v. Schimpf,
133 Or. 581, 587,
(291 Pac. 1009), (1930).

Quotations from these cases are set forth at Appendix 116-117, to which we refer.

(26) CITY'S POWER REQUIREMENTS.

The City's total power requirements are less than 170 horse-power. This is a maximum demand. A kilowatt

equals three-quarters of a horse-power. Testimony of the petitioner's Division Manager Thompson, quoted at Appendix 150, (R. 168).

Mr. Muirhead of the Cement Company testified that the City's requirements which the Cement Company was bound to furnish were 20 kilowatts, which would be, according to said testimony of Thompson, 15 horse-power. The testimony that 170 horse-power was the limit of the requirement was not disputed.

The amount of power that could be made from respondents' 220 second-feet, with the McClure 75 second-feet, at the available head is shown by Engineer Boyle's testimony to be 350 kilowatts (quoted at Appx. 150, R. 201), which would be in excess of 250 horse-power, much over the maximum requirement of 170, supra.

City's 220 s. f. and 75 s. f. would flow naturally into respondent's power plant without excavation of the portion of the river bed shattered by the blasting.

In the trial of the former case between the parties (35 F. (2d) 317, 1929) Mr. Muirhead testified that his Cement Company could not get along with the 220 second-feet; that it would not build a plant for that; that it could easily get the 220 second-feet without going across the river for it, (quoted at Appx. 148-9 from R. in former case, introduced here, 219-220).

Engineer Boyle testified that all of the water of the City's appropriated rights, the 220 second-feet, plus the

McClure 75 second-feet, (total 295 second-feet), would flow naturally into the respondent's contemplated power plant without the removal of any of the rock from the shattered area, that is,--with the water flowing in a state of nature (in its natural channel), and this would be so at the stage of low water, (Appx. 147, quoting from R. 196-7). This is undisputed in the record.

Petitioner admits the right of the City to its 220 second-feet appropriation, and the 75 feet McClure appropriation. But the adjudication proceedings, Defendant's (Respondents') Exhibit "O", require the 75 second-feet to be returned to the river above petitioner's land. Hence, petitioner's objection to its use *several miles below its point of return,* and on the respondents' side of the river, (Appx. 146).

Hence, we say that there is no question of the needs of a municipality involved in this case. The 220 second-feet with the available head at the place of use will make more power than the City's maximum needs. That much water will naturally flow into the contemplated power plant of the respondents at low water with the river in a state of nature. Hence, the *City's requirements* did not make it necessary to dynamite the bed of the river, nor to remove the blasted rock from the shattered area.

As quoted, supra, Mr. Muirhead, for the Cement Company, took the entire responsibility for drilling the

holes in the river bed into which the dynamite was inserted, and caused the dynamite to be exploded, (Appx. 122, R. 324-5), thus precipitating immediately, as he must have known it would, the present controversy.

CHAPTER XX

(27) EFFECT OF REMOVING FROM THE RIVER BED THE ROCK SHATTERED BY THE DYNAMITE.

This subject with record references is treated at Appx. 131 to 143.

EXHIBITS

In the examination of this question it will be helpful to examine the evidence descriptive of the following numbered exhibits, to which reference is made in the testimony upon this subject. These exhibits are the following, described in the testimony at the following record pages, quoted in the Appendix as stated.

Plaintiff's (Petitioner's) Exhibit 9, R. 135, Appx. 126

Plaintiff's (Petitioner's) Exhibit 10, R. 139, Appx. 127

Plaintiff's (Petitioner's) Exhibit 12, R. 145, Appx. 128-9

Plaintiff's (Petitioner's) Exhibit 22, R. 349, Appx. 129

Plaintiff's (Petitioner's Exhibit 2 plus 23, R. 350, Appx. 129-30

PLAINTIFF'S EXHIBITS NO. 2 AND NO. 23

NOTE:

EXHIBIT NO. 2 IS IDENTICAL TO EXHIBIT NO. 23 EXCEPT THAT THE LINE DESIGNATED "A-P" WITH NOTE "OUTLINE OF REEF AS LOCATED APRIL 26-27, 1931, ETC." — IS NOT SHOWN ON EXHIBIT NO. 2.

DETAIL PLAN AND CROSS SECTION OF REEF IS SHOWN ON PLAINTIFF'S EXHIBIT NO. 22.

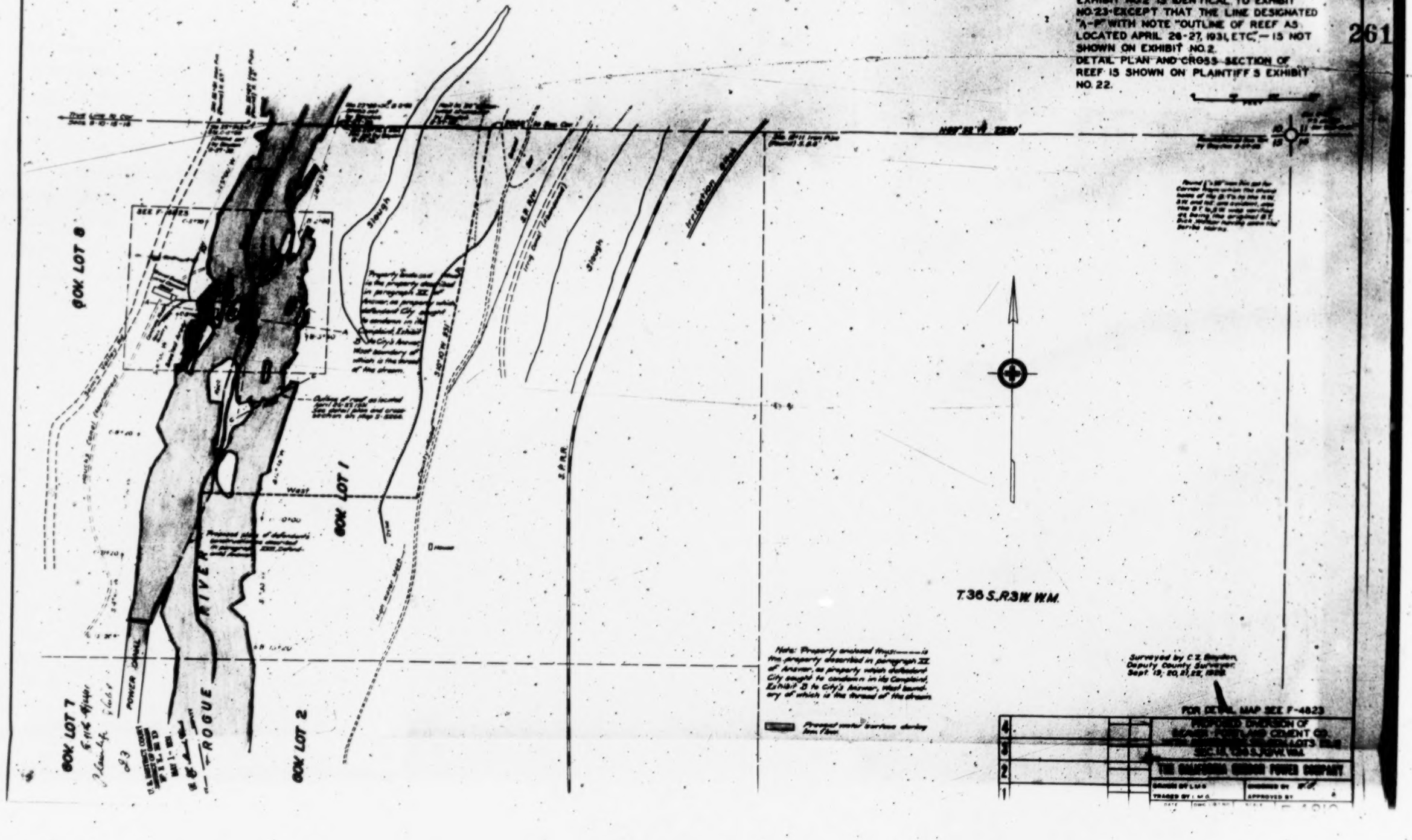


Exhibit 2 plus 23 was used by Olsen, petitioner's Engineer, in explaining the manner in which the reefs of rock in the river bed so divert the current as to divide the stream practically equally on the lands of the petitioner and respondents respectively. This is particularly helpful for a quick understanding of the river at the place of controversy. This testimony is quoted with record references at Appx. 132-3-4. This testimony also shows the blasted area, the dimension thereof, etc.

Engineer Boyle took Plaintiff's (Petitioner's) Exhibit 2, now called "2 and 23" and covered the same subject (Appx. 134-5, quoted from R. 192-3).

Mr. Boyle explained the effect of the removal of the rock from the shattered area; that the opening made would receive and discharge the 1347 second-feet (covered by the permits) at a water surface elevation at 1069 or at 1068, or 1067; that when the Cement Company's power plant would be operated there would be practically no water flowing over the reef marked "C-C" on Plaintiff's (Petitioner's) Exhibit "2 and 23," leaving 100 to 150 feet of dry land opposite Petitioner's Lot 1.

But above the reef C-C would be a pond; that the reef C-C controls the flow of the water on the east side of the river; but that if the shattered rock be not removed (in other words if the injunction stands) the river would remain in its natural state, and two-thirds of the water would flow to the west side below

and west of the line on the map A-B to B-C, (Appx. 134-5-6-7, quoting as indicated from R. 192-3 and R. 196.

CHAPTER XXI

(28) TYPE OF POWER PLANT TO BE INSTALLED BY CEMENT COMPANY WOULD PUT THE WATER OF THE RIVER AT ITS CONTROL.

Mr. Muirhead testified that his company intended to build a hydro-electric plant for the manufacture of electrical power by the use of turbines and generators; that the turbines would be equipped with gates that would be operated automatically, according to the amount of power used at the cement mill. That when the electric load required at the mill is taken, that amount of water will automatically be let into the turbines or wheels, except that there would be maximum amount that the company could not exceed (Appx. 139-40, quoting R. 111).

Engineer Boyle testified that he heard Mr. Muirhead's explanation, is well acquainted with the type of plant, and described in detail the manner of its operation. The cement mill, situated at a distance of less than a mile from the site of the plant, would be operated by turning on and off the motors drawing the amount of power required. This action would automatically open the turbines drawing from the canal the amount of water necessary at the available head there, to make the power; that the sudden turning on of the power would automatically increase the quan-

tity of water necessary to pick up the additional load, meaning the amount of energy required to run the motors. He explained that there is a set of gates that are operated by a governor which is electrically controlled. These gates open and close on the turbines, allowing to pass, the required amount of water to generate the load as indicated by the delivery at the end of the distribution line, (cement mill). The gates are operated automatically; if there is no load at the cement mill there would be no water flowing through the electric plant. When the mill is not in operation the water would be discharged through spillways; that in the ordinary operation of the cement plant the usual thing to do would be to draw the waters from petitioner's property whenever the flow was less than 1340 second-feet; that naturally, if the power is required for the Cement Company's use, it would be economical and proper in the operation of the plant to draw all of the water it could get—all of the water available, (Appx. 140, 143, quoting R. 188-191, 208, 209, R. 199).

The record describes the situation at the place of the explosion. The removal of the shattered rock would make a comparatively straight race into the forebay of the canal leading to the turbines; at the head of the canal is a spillway, and in the side of the canal below, another. So at its will, the Cement Company could draw all or any part of the flowing water from petitioner's land. The fluctuation would make it impossi-

ble to use petitioner's riparian right for any purpose.

(29) STAND-BY PLANTS AND THEIR USES EXPLAINED.

We have briefly covered this subject in the latter portion of the "Statement of the Case." Brief, page 11. A full explanation of these plants and of their uses is to be found at Appx. 143-5. Here is shown the great necessity for the installation by petitioner of such a plant upon its lands involved herein.

CHAPTER XXII

Petitioner and respondents, respectively, own all of the lands lying under the waters of Rogue River, and between the banks thereof, at the place with which we are concerned. Under the ancient Federal Act of May 18, 1796, the stream and the bed of the river were common to both petitioner and respondents.

And the act of the Cement Company in the destruction of this river bed, the use of which was common to the respective parties, was violent and uncalled for,—an illegal act. With all due respect for those who committed the act, it was made in total disregard of the rights of the petitioner, and in defiance of law. It evidenced an irresponsiblity, or at least a wantonness, that is unexplainable. By no legerdemain could it solve the problems of the contending parties. It was not the usual method of determining important rights to property. It could hardly be said to be in accordance with any of the maxims of equity. Carried to a conclusion, the act would have deprived petitioner, without due process of law or compensation, and in violation of the Constitution of the United States, of its property worth to it in excess of $30,000.00. It was property needed, and badly needed, by the petitioner as a public utility in its service of power to the public, including the Cement Company. It was an effort to take by force, a stream which it sought to use in the manufacture of power for

itself; power which it could acquire in the usual way from the utility that stood ready to serve it, and which was by law required to do so.

(30) THE RIVER BED

By the terms of the Federal Act of May 18, 1796, and still in force, it is provided that in all cases, like this one, where the *opposite banks of a non-navigable stream belong to different persons, both the stream and the bed of the stream become common to both.*

We construe this to mean that they are common owners in the right to use both the stream and the stream bed. Here, the respective owners actually own to the thread of the stream. This thread is the bounary of the respective parties, separating their lands. But together they have the right to use both the stream and the stream bed, as provided by the Federal Statute. The bed is the way, or course, for the stream. The right of use is, under the statute, joint, as between the owners of the opposite banks of the stream. We cite the statute:

Section 9 of Chapter 29 of the Act of May 18, 1796, being Revised Statutes, Section 2476, as printed in Volume 2 of the United States Compiled Statutes of 1901, reads:

> "Sec. 2476. Navigable rivers within public lands to be public highways.
>
> All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where

the opposite banks of any streams not navigable belong to different persons, the *stream and the bed* thereof shall become common to both.

Act May 18, 1796, c. 29, Sec. 9, 1 Stat. 468.
Act March 3, 1803, c. 27, Sec. 17, 2 Stat. 235."

This statute was construed by this Court in the case of

John E. Scott v. Charles P. Lattig, 227 U. S. 229-245, 57 L. ed. 490, 33 Sup. Ct. 242, (decided February 3, 1913).

This decision was dealing with the effect to be given to the admission of Idaho as a state, and to the disposal of fractional subdivisions on the Snake River, a navigable stream, and the statute was relied upon in the determination of the question involved.

We quote from that portion of the decision at 227 U. S. 242:

"Coming to the effect to be given to the admission of Idaho as a state and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that Snake River is a navigable stream, for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat. Sec. 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, chap. 29, Sec. 9, U. S. Comp. Stat. 1901, p. 1567; March 3, 1803, 2 Stat. at L. 229, chap. 27, Sec. 17), declares: 'All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both'; and of this provision it was said in *St. Paul & P. R. Co.*

v. Schurmeir, 7 Wall. 272, 288, 19 L. Ed. 74, 78, *'the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways'."*

CHAPTER XXIII

Against such depredations as are described and referred to in the foregoing chapter, equity offers its time-honored remedy of injunction. So we present this phase of the case under the title:

(31) INJUNCTIVE RELIEF

In Oregon, as elsewhere, in both state and federal courts, the injunction has been used freely for the protection and preservation of water rights. In this case, to deny petitioner injunctive relief, would be to confiscate its property. Consistently through all the years since statehood, Oregon's courts of equity have used the power of injunction to protect the riparian's rights in streams on which his lands border; to prevent destruction of the stream banks that would change the course of the stream on the riparian's land; have compelled restoration of such banks by the party responsible for their impairment; have enjoined the diversion of water from the riparian lands to the present, or even the *future* injury of the riparian proprietor.

In this case the Cement Company has not actually gone upon the lands patented to the petitioner and committed the depredations complained of; but *has* gone close to the thread of the river which defines the boundary dividing the property of the respective parties. It has committed these depredations in the river

bed at a strategic place for the drawing of all of the water to its side of the river, and into its proposed plant.

An examination of Plaintiff's (Petitioner's) "Exhibit 2 and 23," inserted in this brief, (with the explanations given in the record) will inform the court of the natural barriers in the river bed, which make the scene of the dynamiting perfectly situated to accomplish the purpose of the Cement Company. If the blasted rock in the shattered area be removed, and the sides of the excavation be smoothed, and the river bed lowered to a depth of six feet below low water, and the respondents' widening and lowering of its canal connecting this excavation with its proposed electrical plant shall continue, and the plant be installed of the type described by the testimony, then the entire river at any ordinary stage of the water, will be completely at the command of the Cement Company's employee in the cement mill. If the automatic gates at the spillways of the canal be used as contemplated, then the water thus drawn into the canal through this deepened channel, will waste out through the spillway when not used and drawn through the Cement Company's turbines. Or, if the gates be set at a maximum height, the resultant fluctuation in the flow of the stream at petitioner's lands, would make them worthless. Occasionally the flow would be normal, and at other times the waters edge on petitioner's side of the land would be

from a 100 to 150 feet from the petitioner's present boundary.

(32) PETITIONER'S BOUNDARY

Under the title "Oregon Authority on Boundary" we cite the Oregon cases to the effect that when the thread of a non-navigable stream is moved suddenly, the boundaries of the riparian owner's land remain unchanged. Authorities are shown at Appx. 101-3.

That these results will follow from the removal of the blasted rock from the shattered area, with the accompanying change in the canal, is established beyond dispute, if not admitted.

It is unthinkable that petitioner would not be entitled to have its riparian lands, and its riparian rights protected against these depredations.

(33) AUTHORITIES IN SUPPORT OF THE INJUNCTION.

Prior to the issuance of petitioner's patent, to wit: in 1881, the Oregon Court in

Shively vs. Hume, supra,

enjoined the defendants therein from diverting the water which they had changed from its natural course.

In 1886, the year following the issuance of petitioner's patent, the Oregon Court in

Weiss vs. Oregon Iron & Steel Company, supra,

permanently enjoined the interference with the ripar-

ian proprietor's water rights, closing that case with the following paragraph:

> "Nor do we think the objection to the exercise of the jurisdiction well taken. Mr. High says: 'A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel. Nor does the neglect of complainants to use or appropriate the water-power, or the fact that they have as yet sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.' (High on Injunctions, Sec. 795, and authorities cited.)"

We cite:

Mace vs. Mace,
40 Ore. 586,
65 Pac. 660,
68 Pac. 737 (1902)
(Opinion 587-8).

This suit, was brought in 1899, to restrain the defendant from interfering with the flow of the water of Silvies River across plaintiff's land and through an alleged natural channel. At the upper end of defendant's land there is, and from time immemorial has been, a natural depression, or slough, through which the water has been accustomed to flow, during highwater, onto plaintiff's land. In 1888 defendant, with the consent of plaintiff's predecessors, constructed a ditch through plaintiff's land, to utilize the surplus water for irrigation. And at the same time he cut

the bank of the river at the head of the slough, put in a box or flume, and filled up the depression on either side thereof; and by dams above and below raised the water so that it flowed out of the flume in greater quantities. In 1898 he replaced the flume with a larger one.

This suit was commenced in 1899, to prevent the defendant from interfering with the flow of the water, (Opinion 587-8).

The answer denied the material allegations except plaintiff's land title. He averred that the so-called natural slough was a ditch made by the defendant to turn the water through and over plaintiff's land, and on the lands owned by him below.

The opinion stated there were two questions. (1) Was the slough a natural water course? (2) If so, to what relief is plaintiff entitled? (Page 588).

As to number 1, the Supreme Court decided that the depression was a natural water course (Opinion 589).

The Court said:

(Italics ours)

> "The next question is *as to the decree that should be entered* under the circumstances. The defendant, as a riparian proprietor, is entitled to have the water of the stream flow as it was wont to do under natural conditions, and to that end he has a right to maintain the banks at their usual or natural height: *Cox v. Bernard*, 39 Or. 53 (64 Pac. 860)." Opinion 589-90.

Of the rights of the plaintiff, the Court further said:

"His rights depend alone on the fact that he is a riparian proprietor upon a natural water course, and all that he is entitled to is a decree *restoring* such water course and its intake to their natural condition. The court has no authority in this suit to make a decree allowing or permitting him to maintain a head-gate or flume in the bank of the river on the defendant's land, nor to go upon such land for the purpose of regulating the flow of water. All it can do is to compel the defendant to restore the bank to its natural condition, and permit it so to remain."

"A contention is made that, because the permanent part of the dam put in by the defendant is about two feet high, he is entitled to raise the bank at the head gate at least eighteen inches. But the evidence shows that a very slight raise in the water at the point where the dam is located will cause the stream to flow back and through the West Fork, unless prevented by what is known as the 'Levins Dam,' over which neither party to this suit has any control. *And moreover, as already suggested, the dam is an artificial structure, put into the stream by the defendant, and its future maintenance depends entirely upon his will.*

A decree will be entered here in accordance with this opinion, and the cause remanded to the court below, with directions to *enforce such decree;* plaintiff to recover costs in this court and the court below." Opinion 590-1.

ON REHEARING (591)

The defendant asked the Supreme Court to modify said decree so as to permit him to raise the banks of the stream at the place where he had cut them. The court had directed that he restore the banks. He alleged his purpose in the modification was to be permitted to confine the waters within the channel when it should be

raised by the dams which he had erected. He claimed that during a great portion of the time in the irrigation season the water would not be high enough to run thru the channel; that during such times he could use it for irrigating his riparian lands by raising it through artificial dams. But that in order to do so it would be necessary to close the cut during the times he was so using the water.

The Court said the point had not developed by the testimony, nor did the record show except generally the time of the year when the water would naturally flow to *plaintiff's* lands.

The Court on this rehearing said:

> "This point was not developed by the testimony, nor does the record show, except in a general way, at what time of the year the water will naturally flow down to plaintiff's land. The court below found that annually, from about the first of April to July 15, the water has from time immemorial run down through the natural channel referred to, but as to whether the flow is continuous or not the evidence and findings are silent. If the defendant's position is correct, it would perhaps be equitable and just to allow the desired modification, if, under the facts a decree could be so framed as to protect the rights of the plaintiff. But to permit defendant to determine for himself when he may raise the bank would, it is believed, tend to further litigation, and, in practical effect, destroy the value to the plaintiff of the decree heretofore rendered. If, when the case goes back to the court below for enforcement of the decree, it is made to appear to that court, that a decree can be framed, fixing definitely the date or dates when the defendant can *raise the bank without interfering with the*

rights of the plaintiff, it is authorized, if it deem it proper, to frame such a decree."

In

Phipps vs. Rogue River Valley Canal Company,
80 Ore. 175, 181,
156 Pac. 794, (1916),

the Supreme Court of Oregon held that the infliction of an "Irreparable injury," such as equity will enjoin, includes all the degrees of wrong of a repeated or continuing kind, which produce hurt, inconvenience, or damage that can be estimated only by conjecture, and not by accurate standards of measurement. We quote it at Appx. 112.

The case cites

Bernard vs. Willamette Box & L. Co.,
64 Ore. 225,
129 Pac. 1039,

which upholds the right of a court of equity to grant a mandatory injunction, at the behest of the owner of a lot abutting on a street, for the removal of an elevated roadway in the street, obstructing ingress to and egress from the lot.

In 1901 the Oregon Court in

Cox vs. Bernard,
39 Ore. 53-63,
64 Pac. 860,

held:

That every riparian proprietor of lands on the banks of a natural stream has an equal right to have the water

of the stream continue to flow in its natural course as it was wont to run, without diminution or change, and to the end that he may insure the water coming down to his property. He assuredly has the right to maintain the banks of the stream in their accustomed and natural condition so that the water may not be directed or carried off by reason of washouts, rents or crevasses therein, stating that the rule is well established that a riparian proprietor may protect his premises against overflow of the streams. And that it is reasonable that he may also protect the banks and thereby secure the use of the water that would naturally flow within them. Hence, injunctive relief may be granted. (Quotation at Appendix 114-15).

This is the doctrine of the Washington Court.

In

Rigney vs. Tacoma Light & Power Co.,
9 Washington, 576,
38 Pac. 147,

the Washington Court said:

That the right of the riparian proprietor to the flow of the water is inseparably annexed to the soil, and passes with it, not as a mere easement or appurtenant, but as a part and parcel of it. Use does not *create*, and disuse can not *destroy* or sustain it. That actual damage is not indispensable as the foundation of an action.

It is sufficient to show a violation of a right. The law will then presume some damage.

A quotation is made from the case at Appx. 115.

In

Gould vs. Eaton, (Cal.)
49 Pac. 577-8,
(Cited at Appx. 112)

the Supreme Court of California held that the riparian's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner he has a right to the entire flow of the stream, and the *claim* of the defendants that they have a right to divert a portion of the flow, authorizes him to invoke the aid of equity in order *that the claim may not ripen into a right.*

In the Appendix at 112-113 we quote:

Farnham, Waters and Water Rights,
Volume II, page 1722.

Section 530 states the doctrine that a riparian proprietor is entitled to an injunction against obstruction of the banks of the running stream, although he may not be able to show a present damage, on the ground that there is a present injury to the right of property, and may produce serious injury in the future.

At page 113-14 of the Appendix, we cite:

Farnham, Waters and Water Rights, Vol. II,
Page 1771, Section 551.

This text is to the effect that the riparian owner is entitled to the natural flow of the stream given by

nature, which depends solely on the ownership of the banks of the stream, regardless of whether any use has been made of it or not; that the conclusion must necessarily follow that any interference with this right will entitle the riparian owner to redress whether he can show any actual injury or not.

ARGUMENT

The scene of this controversy is on Rogue River, one of the most delightful streams in Oregon. The suit involves the right to the use of the waters of the stream at a place thereon near respondent city.

The petitioner's rights in the stream were conveyed to its predecessor by patent of the United States dated March 11, 1885. These lands border along the east bank of said stream, flowing south, and are on the opposite side of the river from similar property bordering on the stream, owned by the respondents. The lands of the respective parties were patented at a time when the patents carried riparian rights to the use of the waters of the stream. These rights, which are the common law riparian rights, abided in and were a part and parcel of all of these lands, long before the admission of Oregon to statehood. At the time of its admission, Oregon had the right, as has every sovereign state, to adopt the principles of the common law, from whence comes the riparian doctrine, or to renounce these rules of the common law, and by statute create whatever laws it desired to apply, governing the rights of those whose lands bordered on the streams and lakes and other bodies of water in the state.

Not all of the states, upon admission, have adopted the principles of the common law, but Oregon had been settled by pioneers from states accustomed to admin-

ister the common law. Among these pioneers, as the signatures upon Oregon's Constitution will show, were men of renown, well versed in governmental matters.

Prior to statehood, Oregon's affairs were administered according to the principles of the common law, from the earliest settlements.

The settlers of Oregon carried there with them the principles of the common law, so far as suited to their new environment, and by the territorial law of Oregon in force at the time of the adoption of the Constitution, which provided that the common law of England and the principles of equity not modified by the statutes of Iowa, or of this government, and not incompatible with its principles, constituted a part of the law of the land.

By Section 7 of Article XVIII of the Constitution which became effective upon the admission of the state, it was provided that all laws in force in the territory of Oregon when the Constitution should become effective, and consistent therewith, should continue in full force and effect until altered or repealed.

And so, as announced by the Oregon Supreme Court as late as 1926, that court held that it felt as much bound by the applicable rules of the common law, where such rules had not been modified or abrogated by statute, as it did by the statutes themselves. Every early Oregon case after the adoption of the Constitution, and which announced the water right laws applicable to the streams of the state, adhered to and administered the

common law riparian doctrine, save only as modified by the doctrine of *prior* appropriation.

According to the common law, as announced by the decisions, and eminent text writers, these common law principles granted to the owners of the lands bordering on such streams, equal rights in the use of the waters thereof for beneficial purposes. They included rights for irrigation, domestic use, and the manufacture of power.

This stream is a meandered stream, so that under the riparian doctrine, the lands bordering on it followed the meander line of the stream, and for the purpose of computing the acreage in government purchases of land, the ownership extended from this border line, to the thread of the stream. Thus it extended from the edge of the river, half way across the same. So too, the landed proprietor on the opposite bank owned to the same line,—the thread of the stream. Thus the lands of the two stretched across the stream, and there met, so that the east boundary of the land of one, became the west boundary of the land of the other.

After the admission of the state, and on July 26, 1866, Congress passed an act of that date confirming in those who had used the water of these streams upon public lands, the right to continue in that use. Such uses had been common, for all purposes, including mining, but it was universally held by the courts that when a prospective homesteader or other settler entered a piece

of government land intending to comply with the laws of Congress to acquire the same, this act of settlement, resulting in patent, cut off absolutely, as of the date of the settlement, the right to make what is termed an appropriation of the waters flowing over said land. This was a wholesome provision. These pioneers settled along the streams, built their homes, raised their families there, and contributed to the building up of the western citizenship, and the education of its people.

So these rights grew up as a part of the history of the country. Here and there were appropriations for mining purposes, and a few for irrigation. Of course riparian rights carry other values that are due to the fact that the lands lie along the stream, and lands were selected because of their relation to the stream.

In Oregon there has never been, prior to the controversies of which we speak, any exception to the rule that one man could not enter the lands of another and tap the stream on his land and deprive him of the benefits thereof. The right to do this by eminent domain proceedings was allowed in some cases for the general public good. And it was always the law in Oregon that when the land was patented, it carried with it these riparian rights, the priority of which related back to the date of the settlement on the land, by the patentee or his grantee.

There were never any appropriations made to draw from the lands of the petitioner any water whatever,

either before or after the issuance of petitioner's patent. On the opposite side of the river there was an appropriation made of 220 cubic feet per second of water for power purposes. And one McClure acquired 75 second feet of water on petitioner's side of the stream, but above and upstream from the petitioner's land.

In the river that flows between the lands of the respective parties, and over the same, are reefs of bedrock protruding in lines across, and up and down the stream, which divide the waters thereof almost equally, as will appear from petitioner's Exhibit "2 and 23" (which is its designation), inserted in this brief.

In 1909, the Oregon Legislature passed what is termed in the record as the Oregon Water Code. It purported to be a law for inventorying the amount of water in the streams, and determining the relative rights of various claimants thereto, to use the same. In its opening sentence, it expressly provided that all appropriations of water must be made subject to existing rights. The lands of the respective parties, bordering on the river as they did, were riarian thereto, and, had these riparian rights to the use of the water. So that by the first expression in the act, appropriations thereunder were required to be *subject to existing rights*, and not to impair them in any way. It seemed to provide a way for the peaceful and friendly settle-

ment of water controversies. It contained a statement that the actual application of the water to a beneficial use by a riparian proprietor, before the passage of the act, should be *deemed to create* in him a vested riparian right. This was a novel provision. It was always one of the cardinal attributes of the riparian right that such rights could neither be lost by non-user, nor acquired by user. But this provision, which was subdivision 2 of Section 70 of the act, did not provide that the provision defined a vested right. It simply purported to declare the status resulting from beneficial use prior to the enactment. It contained no hint or word that it was the instrumentality whereby the state would destroy these valuable riparian rights in the thousands of acres of splendid land bordering on these streams, simply because they had not been put to a beneficial use, although of course they were of some beneficial use every moment of time, following the settlement upon the land.

This law provided for a system under which a state engineer upon the petition of one or more users on any stream, would survey the streams, whether the people were in controversy over their water rights or not, and haul them into court for a determination of their respective rights to the use of the water. But because the act did not purport to administer the relative rights of these riparian owners who had not used the water before the passage of the act, there was no occasion to

serve process upon such riparian owners. Where ditches and other evidences of irrigation or similar use were upon the land, service was made The streams were adjudicated under the act.

The respondent city had acquired the McClure right, and it did acquire the right on the land opposite that of the petitioner. These were rights by appropriation. A decree was given to the city as the successor of the original claimants for these two appropriations. The owner of petitioner's lands was not served with process, and made no appearance in the case. Under the act as construed by the Oregon Court In Re Willow Creek, the owner of petitioner's land, not being a party to the suit, was not bound by the terms of the adjudication decree. There was no occasion to serve him. The rights were patent. The law establishing the nature and character of the rights was settled, and the owner of the petitioner's lands had a right to enjoy the property which he had in these riparian rights. This was his property.

Matters continued in this condition until the respondent cement company, after years of inactivity, began to purchase considerable power from the petitioner, a public utility, engaged in the general sale and distribution of power there.

In 1926, at about the same time, the cement company and the petitioner bid for the purchase of the city's riparian lands, and the city's small power plant. The

petitioner offered the city $40,000.00 in cash, and power for its municipal uses at a rate entirely satisfactory to the city. The cement company offered only $22,500.00, payable in monthly payments of $100.00 each, plus a similar contract for power. The charter of the city was amended to permit the sale, and the cement company's proposition was accepted, due doubtless to the fact that the little town was a company town, and the cement plant was adjacent to its corporate limits, and furnished employment for many of its citizens.

The cement company, by written contract of purchase, Exhibit A to Respondents' answer, acquired the city's property and its State Engineer's Permits to appropriate water from the stream, upon said partial payment plan. And at the time of trial, said monthly payments had continued, which, calculated to the present time, would perhaps amount to $10,000.00. Under the law of Oregon, cited, the situation creates the cement company the equitable owner, the party in interest, leaving the city the possessor of the legal title as security for the balance of the purchase price.

But the cement company planned, in the purchase of this property, to, through said permits, issued by the state engineer, appropriate sufficient water to make 1347 cubic feet per second, which, according to the evidence, is more than twice what the river flows at its low stage. It is about the average normal flow. In floods, there is of course much more water in the stream.

Shortly after the cement company's purchase, namely on October 5, 1926, it brought suit against the petitioner, in the circuit court of the county, and in the name of the city, thereby using the city's power of eminent domain, to condemn nine acres of petitioner's said lands, upon which to build a portion of the eastern end of its proposed dam for the diversion of the water from petitioner's land, to the west side of the river, into the site of its proposed power plant. Its plan was to build an electric plant at that point, and transmit the power to its cement mill, a distance of less than a mile. Of course the result of that would have been to have entirely destroyed the value of petitioner's land, established at $30,000.00 for power purposes.

The petitioner required the property for the purpose of erecting thereon what is known in the power business, as a stand-by plant. At this time the petitioner had built, and was building in the adjacent mountains, plants for the manufacture of sufficient power to supply the users in the Rogue River Valley, served through its distributing plant on said river, situated some two or three miles upstream from the site of this controversy.

The predecessors of petitioner in the power business were the original manufacturers of power in the territory. Through the use of this power, the country had grown and been settled up, increasing the demand for power to such an extent that larger plants were built.

Long transmission lines were brought through the mountains to the distributing point. These transmission lines were subject to injury resulting from mountain storms, fire, and other hazards which interrupt the service. So, to keep pace with the development which it had helped to make, and to comply with the public service requirements as to service, it became necessary to construct this stand-by plant of sufficient capacity to furnish power to the consumers in the immediate vicinity, temporarily during these periods of breakdown. When the petitioner was ready to proceed with this development, estimated to cost three-quarters of a million dollars, it determined to acquire, by purchase, if possible, the riparian lands and the general situation controlled by the city, and to build a larger plant, which would not only act as a stand-by plant, but make a surplus of power so as to become a paying unit in its system. Hence the bargaining for the property.

The cement company lost the suit to condemn, because the jury decided that the petitioner needed the property for its public purposes. This, however, did not stop the cement company from its effort to acquire the petitioner's property for nothing. The condemnation suit went to judgment on June 13, 1928. Shortly thereafter, the cement company began to build trackage from its riparian lands, across onto petitioner's property, which it had sought to condemn. And it actually

began the erection of a concrete pier of substantial dimensions on petitioner's property, claiming the right to do so under an abandoned easment.

September 13, 1928, the petitioner instituted suit against the respondents to stop the trespass, and this case went against the respondents and they appealed to the Court of Appeals from the District Court of Oregon. The decree enjoining the construction was affirmed there, but modified slightly, and a decree based on the mandate was entered, as alleged in the complaint, and admitted in the answer, on the 20th day of December, 1929, permanently enjoining the respondents from further trespassing upon petitioner's riparian lands. That decree has never been modified, and is final.

Within about six months after the entry of that decree, there was an explosion in the river just over the meander line on the respondents' side of the stream, and two hundred charges of dynamite were exploded by the cement company in a line of drilled holes in the river bed, so placed as to shatter the rock bottom of the river for a distance up and down stream of about 200 feet, and a width of about thirty feet, and to a depth of about six feet below the surface of the river at low water. There is no dispute about the purpose of this action. It is admitted in the record that the purpose was to create a deep channel there which would draw the full amount of the water represented by the per-

mits,—1347 cubic feet per second,—through that race at all times when there was that quantity water available in the river. This of course at once precipitated an additional suit, which is the present one.

The dynamiting occurred on the 21st day of July, 1930, and the suit was filed, and further depredations enjoined, in the District Court of Oregon on the 26th of the month. It is the admitted intention of the cement company to remove the blasted rock from this shattered area, continue its operations already begun for the widening and deepening of the canal that connects with this new opening to be made, and so draw from the petitioner's land all of the water in the river to the capacity of the race so made.

The place at which the river bed was shattered is strategically located for the purpose of drawing this water from petitioner's land into the site of the cement company's proposed electric plant.

It was admitted in the case that the city's 220 second feet would flow naturally into this power site, without the removal of any of the rock from the shattered area. And, while petitioner does not concede the right to use the McClure 75 second feet on the west side of the river, since the decree of adjudication requires it to be returned to the stream on the east side of the river, above petitioner's land, still the undisputed testimony is that that 75 second feet, plus the 220 second feet, naturally flows into the site of the power plant without

the removal of any of the shattered rock from the dynamited area. So that from no point of view has the city any interest in the removal of the blasted rock, nor in the cement company's acquiring petitioner's rights to the use of the water.

Mr. Muirhead of the cement company took full responsibility for the drilling, and superintended the exploding of the dynamite. He testified that the carrying out of his plan would leave about 122 second feet of water on the petitioner's side of the river. He said that it would take about that much for a fish-way, and he understood the law required the building of fish-ways for the passage of fish on their migration past the power plant. So that, entirely in disregard of the petitioner's rights in the matter, the cement company would not only take the water from petitioner's land and leave a dry river bed between its western boundary and the thread of the stream, (as it would when thus changed) but it would use petitioner's land for the fish-way which the law requires those so obstructing the river to build and maintain.

It is admitted that the cement company does not have the powers of a utility, but it is a private corporation. Yet the cement company's testimony shows that such power as it made in excess of its mill requirements, it would sell and dispose of in the market. It urges that it is paying a large price to the petitioner for power used in cement manufacture, but it is probably equally

true that the operation is profitable, or it would not be carried on.

Of course a utility must have some good customers if it is to supply power to the smaller ones at reasonable rates. So far, therefore, as the equities are concerned, it seems to us that they are on the side of the petitioner. It seems that the suit is unnecessary, and grows out of a desire to acquire petitioner's riparian right to the use of the water, without compensation, and to take it and use it in competition with the petitioner, in a business which is solely the business of the petitioner, and which the respondent cement company is not qualified to perform.

The cement company claims no other right to commit these depredations and to take this water except through the incompleted permits of a state engineer, which have been issued *subject to existing rights.*

The authorities cited are to the effect that such permits are without value from the standpoint of being property. A very large proportion of them, as said by this court, never ripen into real appropriations. At best they are mere options, or, as some courts say, evidences of an intention, or proposed intention, to appropriate water.

The Oregon Court has construed this Section 1 of the Water Code, as not granting to any permit holder the right to enter upon another's land for the purpose of establishing facilities for the appropriation of water.

This, the court says, can only be acquired for public purposes and in compliance with the constitution.

The Appellate Court affirmed the judgment of the District Court, the result of which is to dissolve the existing injunction and permit the blasted rock to be removed, and petitioner's riparian rights confiscated. The majority opinion in the case followed the purported doctrine of a 1924 Oregon case holding that said subdivision 2 of Section 70 of the Code had destroyed all riparian rights that had not been used when the code was adopted, but preserving those rights which had been used at that time, and to the extent of the use that had been made. The act carried an emergency clause, the result of which was to put it instantly into effect upon its approval by the Governor. Some states having the same riparian doctrine as prevails in Oregon, have sought to change the law respecting riparian rights so as to require them to be put to a beneficial use within a certain time. But, as expressed in the dissenting opinion of Mr. Justice Wilbur, in this case, construction of the water code in such a manner as to destroy petitioner's water rights and permit them to be adversely acquired by the cement company, is to take the property from one and give it to another, and that there is no authority for such taking. He expressed the opinion that as the respective parties alike enjoy riparian rights, the cement company, if it desired to take petitioner's rights, should disclaim any intention of acquir-

ing an adverse right and compensate the petitioner justly, as might be determined by the court, for the power manufactured from petitioner's water, until such time as petitioner is ready to use its one-half of the flow, less the 220 second feet.

In the former case the opinion of the appellate court stated that, whatever may be the rule in Oregon touching riparian rights, the pleading is inadequate and the time is premature for a sweeping adjudication in respect to the relative rights of the parties under the doctrine of riparian rights; that apart from rights that might be acquired by appropriation in Oregon, on the assumption that the common law rule prevails without qualification, the respondents, as riparian owners, would have the same right of use which might turn out to be inconsistent with a portion of the decree if given the extreme interpretation put upon it by the plaintiff (petitioner).

The Oregon decisions, for instance In Re Willow Creek, are to the effect that the settler upon an Oregon stream may adopt either the riparian doctrine or the doctrine of appropriation for the use of water. But that he cannot in the same case, or controversy claim both rights by appropriation and riparian rights for the use of the same water, because they are inconsistent claims. So that the cement company, desiring to take all of the water at the medium stage of the river, and therefore being unwilling to claim as a riparian

proprietor, in each of the three suits claimed solely under the doctrine of appropriation. Petitioner never disputed the City's right to the 220 and the 75 second-feet that had been acquired under appropriations by the City's predecessors. The McClure appropriation was made before any of the lands involved herein were patented.

But evidently the cement company was unwilling to take the suggestion made as to the pleadings in the former case, resulting in the dynamiting of the stream bed.

On May 18, 1796, Congress passed an act, still in force, in which it is provided that in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and bed thereof shall become common to both. This is in accordance with the riparian common law doctrine that entitles the riparian proprietors to have said streams, upon which their lands border, flow in their natural channel, at their usual height, and undiminished in quantity or quality, except such as might result from use by other riparian proprietors similarly situated.

So, while the respective parties here own to the center of the stream, and own the land under the water to the thread thereof, *still, the entire stream, and the entire stream bed is common to both.*

Petitioner contends that it could build a stream-flow plant on its own side of the river, but would prefer

utilizing the water by an impounding dam so as to make its plant do its service as a stand-by plant, and at the same time make a profit, or at least take care of its fixed charges.

An interesting solution is suggested in the dissenting opinion. The petitioner believes that competent testimony could be submitted to the District Court to establish a fair basis upon which most of the water could be used for the manufacture of power consistent with the preservation of the petitioner's riparian rights.

As to the law of the case, the constitutionality of the water code was before the Oregon Supreme Court and decided in 1915,—six years after the enactment of the code. Immediately following, the same question was decided by this court. In both opinions reference was made to the provisions of Section 1 of the code and of Subdivision 1 of Section 70 of the act, each of which provides for the preservation of existing and vested rights. Both the state court and this court decided that it was the intention of the legislature to protect these vested rights. The Oregon Court went at length into the history of the riparian doctrine and the nature and quality of the riparian right. And it said that rights both of appropriation and by the riparian doctrine could exist in the same community. This seemed to settle the question. This court apparently accepted the language of the statute at face value, and the decision of the Oregon court as a real expression of intention as

to the administration of the law. Following that, in 1921, the Oregon Court determined that an Oregon statute which impaired a vested riparian right, violated the Oregon Constitution against taking of private property without compensation. It was then, a few months after that decision, that the petitioner acquired its property in controversy. The established law then was that the riparian rights vested in the land upon the issuance of the patent, and the priority thereof related back to the settlement on the land. When petitioner's patent was issued, there was no doubt expressed in any of the Oregon courts as to this doctrine. Nothing ever occured thereafter to deprive the owner of that land of the riparian rights which abide in it, and which are parts of it. But in 1924 the Hood River case was decided, in which the Oregon Court held that subdivision 2 of Section 70 destroyed the vested riparian rights that had not been used before the enactment of the Code. At the same time, in the Norwood Case, the same court reaffirmed the riparian doctrine and said that it had always been administered and adhered to in Oregon. Then in 1928, the Oregon Court decided the Harris case, which recited in detail the attributes of the riparian right; adopting the language of the Weiss case decided in 1886, wherein the whole subject of the riparian doctrine was reannounced.

Apparently the Appellate Court gleaned the idea from the Hood River case that the Oregon Court had

determined at all hazzards to overturn the riparian doctrine in Oregon. We say this because twice in the majority opinion herein, it is quoted that the court had the assurance of the Oregon Court in the Hood River case that the common law riparian doctrine "would take the heart out of" the Water Code. We visualize the scene as it appeared to the Appellate Court, finding in the reading of the Hood River case the following:

The prevailing opinion of Mr. Justice Bean; the concurring opinion of Mr. Justice McBride; the concurring opinion of Mr. Justice Coshow; the dissenting opinion of Mr. Justice McCourt, in which Mr. Justice Brown concurred; Mr. Justice Burnett's opinion concurring with the dissenting opinion of Mr. Justice McCourt, and the opinion of Mr. Justice Brown specially concurring in the dissenting opinion of Mr. Justice McCourt, covering a range in all of pages from 125 to 259.

In this conference we see Mr. Justice Burnett about to decide, or having just decided, the Norwood case, in the opinion in which it was announced that the title to the land of the defendant in that case

> "carried with it the common law riparian rights *which have always been recognized in this state.*"

And out of this battle came the discovery that Subdivision 2 of Section 70 defined the vested riparian rights as those which had been applied beneficially before the adoption of the Code. It seemed to have been forgotten that the author of the prevailing opinion in

the Hood River case had written the opinion in the Willow Creek case, in which it was announced that both the common law riparian doctrine and the doctrine of appropriation could exist in the same community, and that the Water Code did not impair vested rights to the use of water. It seemed to have been forgotten that in the consideration of that case by this court, this court read the statute as it is, and construed it as protecting the vested rights to the use of the waters of the state.

But apparently because it had been held nine years after the writing of the Willow Creek opinion that the riparian doctrine would take the heart out of the Water Code, the Appellate Court felt bound to follow that doctrine in that case, instead of the reannouncement in the Norwood case *of the very opposite legal rule.*

But is it correct that the riparian doctrine takes the heart out of the Water Code? Go over the adjudications had under that Code as carefully as we may, and we find that the court has administered the common law riparian rights along with the rights by appropriation. True, in various ways riparian proprietors have come out of the adjudication with rights by appropriation, rather than with their riparian rights. But until the Hood River case, the Oregon court had always *given assurances* that the riparian doctrine was maintained.

Those cases ought now to be considered in the good faith in which their announcements were accepted. Con-

strued as it was construed when petitioner acquired its property, the Code was a perfectly legal and constitutional document, fully protecting, with the assurance of the Oregon Court and this Court, the riparian right which abided in petitioner's land as a vested right.

When is it that a court determines, in construing a statute the intention of the legislature in its enactment? Six years after the Code's enactment as expressed in the Willow Creek case, the intention was to protect the vested rights of the riparian proprietor. As construed nine years later, fifteen years after the enactment of the Code, it is interpreted as defining a vested riparian right to be *only* such as had been put to a beneficial use before the adoption of the Code. Is this the consistency upon which the validity of titles is, by "the law of the land" made to depend?

And eight years after this discovery in the Hood River case, it is held for the first time in the history of the enactment, that the Water Code, by the exercise of the *"police power"* of the state *"validly abrogated"* the common law riparian doctrine in Oregon. It was announced in the Willow Creek case in 1915 that to a *limited extent* the Act was the exercise of the police power, and it tied that allegation to the provisions dealing with the adjudication of water rights, and not with the question with which we are concerned. In the Hood River case the police power was not mentioned.

And eight years after the Hood River case the dis-

covery is made that the Legislature used the strong arm of the state, the police power, which is over and above every other power of its sovereignty, to destroy the vested riparian rights that had abided in the riparian lands since the dates of their patents respectively.

At what point in time after the passage of an act do courts discover that the legislature had exercised this subtle power?

California after thus administering for many years the riparian doctrine, with slight modification from the Oregon doctrine, attempted to seriously impair the riparian right by the Water Commission Code of 1913. Over and again its provisions came before the Supreme Court of that state, and consistently it pushed the cup aside, and refused to so far violate the 14th Amendment of the Federal Constitution, as to overturn the titles that throughout these years had depended upon the faith and credit to be given to the decisions of that court. Following that, as we learn from the opinion here, and from the cases, the California Constitution was amended to declare the policy of the state in the matter of the regulation of the use of its waters, and it has now embarked upon the task of using that amendment to regulate and govern the uses of water consistently with the constitutional guarantees that are behind the titles.

January 31 of this year the Supreme Court of California, in *Peabody vs. City of Vallejo*, constru-

ing the California Constitutional Amendment, held:

There should be no endeavor to take from a water right the protection to which it is justly entitled; that the preferential and paramount rights of the riparian owner, and the owner of an under-ground or percolating water right, and the *prior* appropritor, are entitled to the protection of courts at law or in equity; that when there is no substantial infringement of the right —that is, when there is no material diminution of the supply by reason of the exercise of a subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right, and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. That any use of an appropriator which substantially damages such right, taking into consideration *all of the present and reasonably prospective recognized uses*, is an impairment of the right for which compensation must be made, either in money or in kind, and if the public use has not attached, the owner of the paramount right is entitled to injunctive relief. This comes out of the Constitutional Amendment of 1928.

Here we have no statute such as the California Water Commission Act, nor any constitutional provision like the California Amendment.

But the Appellate Court has gone further than all the rest, and, without the aid of a constitutional amendment, overturned the petitioner's vested rights under

the authority of the police power, which doctrine had not been invoked by the state. And this, in the face of the fact, as the briefs and the records will show, that the subject had never been mentioned in the consideration of this case from the date on which it was begun, until it had finally been submitted to the Appellate Court for decision.

This is the language of the prevailing opinion, from R. 450, Federal 569:

> "We conclude then, that the riparian owner's right to the natural flow of the stream substantially undiminished has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."

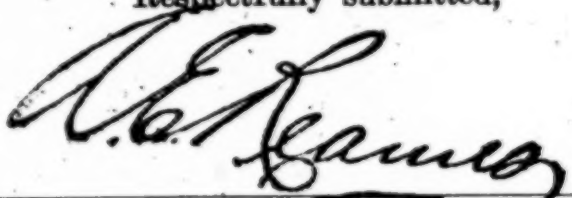
The controversy is one, by the decision of which the public will be greatly benefitted. If the riparian doctrine is to be done away with in Oregon, this should be accomplished in an orderly, constitutional manner. It has never been the constitutional way to take one man's property by the strong arm of the law and give it to another. As was said by Mr. Justice McBride, in Hansen v. Thornton, in the Oregon Court in 1919:

> "One who purchases land abutting upon a lake or water-course, usually considers his right of access to such waters as an element of value in the purchase. When we speak of riparian rights, we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a *usufruct* in the water. To say that the owner of such a right may without his consent be deprived of it by the state or the general government

> permitting some other person to obtain title to the accretion formed by an impounding or diversion of part of the waters that previously washed the shore of his land does not appeal to our sense of justice and we do not believe that the authorities generally support such a doctrine."

Throughout the Oregon judicial history, its courts of equity have never failed to protect the rights of the riparian proprietor against destruction and impairment of the channel and banks of the streams, as is abundantly shown in the authorities cited.

Respectfully submitted,



Counsel for Petitioner.

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APPENDIX

GENERAL LAWS OF OREGON

1909

WATER CODE

Chapter 216.

AN ACT

Providing a system for the regulation, control, distribution, use, and right to the use of water, and for the determination of existing rights thereto within the State of Oregon, providing penalties for its violation and appropriating money for the maintenance thereof, and declaring an emergency.

Be It Enacted by the Legislative Assembly of the State of Oregon:

Be It Enacted by the People of the State of Oregon:

Section 1. Subject to existing rights, all waters within the State may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, or corporation, or association, to any water.

Section 2. Water Divisions.—The State of Oregon is hereby divided into two water divisions, as follows:

Water Division No. 1 shall consist of all the lands embraced within the following counties, to-wit: Benton, Clackamas, Columbia, Clatsop, Coos, Curry, Douglas, Josephine, Jackson, Klamath, Lake, Lane, Linn, Lincoln, Marion, Polk, Multnomah, Tillamook, Yamhill and Washington.

Water Division No. 2 shall consist of all the lands embraced within the remaining counties of the State.

Section 3. Division Superintendents, Appointments and Term of.—There shall be one superintendent for each water division, who shall, immediately after this act becomes effective, be appointed by the governor to serve until January 1, 1911, or until his successor is appointed or elected and shall have qualified, and who shall be a resident of the water division for which he is appointed. At the general election in 1910, and every

four years thereafter, there shall be elected by the voters of the counties of the first and second water divisions of the State a division superintendent, each of whom shall hold office for the term of four years, or until his successor is elected and qualified. Each of said water superintendents shall have knowledge and experience relative to the irrigation law and its administration, and measurement of flowing water, evaporation, seepage, and common alkalies, drainage and hydrographic features of the water division in which the candidate may reside.

Section 4. Duties.—Said division superintendent shall have general control over the water masters of the several districts within his division. He shall execute the laws relative to the distribution of water, and perform such other functions as may be assigned to him. He shall have authority to make such reasonable regulations to secure the equal and fair distribution of water in accordance with the determined rights as may be needed in his division. Such regulations shall not be inconsistent with the laws of the State.

Section 5. Appeal From.—Any person, association, or corporation who may deem himself, or, itself aggreived by any such order or regulation of such division superintendent shall have the right to appeal from the same to the Board of Control by filing with it a copy of the order or regulation complained of and a statement of the manner in which the same injuriously affects the petitioner's interest. The board shall, after due notice, hear whatever testimony may be adduced by the petitioner, either orally or by affidavit, and shall have the power to suspend, amend or confirm the order complained of.

Section 6. Water Division Superintendent and Compensation Of.—Each division superintendent shall receive a salary of two thousand four hundred dollars per annum, in full compensation for all his services, and shall in addition thereto be paid his actual traveling expenses when called away from home in the performance of his duties. Such salary and expenses

shall be paid at the same time and in the same manner as those of other State officers. Such division superintendents shall not engage in any other business.

Section 7. Oath and Bond.—Before entering upon the duties of his office, each division superintendent shall take and subscribe an oath faithfully to perform the duties of his office, and file with the Secretary of State said oath and his official bond in the penal sum of five thousand dollars, with surety, or sureties, to be approved by the Governor, and conditioned for the faithful discharge of the duties of his office.

Section 8. State Engineer.—As soon as possible after this act shall become effective a State Engineer, technically qualified and experienced as an hydraulic engineer, shall be appointed by the Governor. He shall hold his office until January 1, 1911, unless sooner removed by the Governor for cause, and until his successor shall have been elected and shall have qualified. At the general election held in November, 1910, and every four years thereafter, there shall be elected a State Engineer by the voters of the State, whose term of office shall be four years, and until his successor is elected and qualified. He shall receive a salary of $2400.00 per annum and actual necessary traveling expenses while away from his office in the discharge of official duties, payable as other State officers are paid. He shall perform such duties as are prescribed by law, and may employ assistants and purchase materials and supplies necessary for the proper conduct and maintenance of his department in pursuance of appropriations as made from time to time for such purposes.

Section 9. Board of Control.—The State Engineer and the superintendents of the two water divisions shall constitute a Board of Control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. The decisions of said board shall be subject to appeal to the circuit and

supreme courts, which appeal shall be governed by the practice in suits in equity, unless otherwise provided herein. Said board shall have an office in the Capitol at Salem, and shall hold two regular meetings each year for the transaction of such business as may come before it, the first of said meetings to begin on the second Wednesday in April and the second on the third Wednesday in November. The State Engineer shall be ex-officio president of said board, and shall have a right to vote on all questions coming before it. A majority of said board shall constitute a quorum to transact business. The board shall have power to adjourn meetings from time to time, and to meet in special session at the call of the president, or of any two members. Notice of any special meeting must be given by registered mail to each member three days before the date thereof, but such meeting may be held at any time when all members of the board are present.

Section 10. Secretary and Other Assistants; Salary. —The Board of Control shall have authority, with power of removal, to appoint a secretary, who shall receive a salary of twelve hundred dollars per annum. He may be required by the board to furnish such bond as it may deem necessary, for the faithful performance of his duties. The duties of the secretary shall consist in keeping a full, true, and complete record of the transactions of the Board of Control, and he shall certify, under seal, all water right certificates made according to law. He shall perform such other duties as may be imposed by law or required of him by the board. Said board shall also have the power to employ such other assistants and purchase materials and supplies as may be necessary for the proper conduct of its business.

Section 11. Determination.—Upon a petition to the Board of Control, signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be the duty of the Board of Control, if, upon investigation, they find the facts and conditions are such as to justify, to make a determin-

ation of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants. In case suit is brought in the circuit court for the determination of rights to the use of water, the case may, in the discretion of the court, be transferred to the Board of Control for determination as in this act provided.

Section 12. Notice of Proceedings.—The board shall prepare a notice, setting forth the date when the engineer will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when the superintendent of the water division in which that stream is situated, shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such stream is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the State Engineer, or his assistant. The superintendent taking such testimony shall have the power to adjourn the taking of testimony from time to time and from place to place to suit the convenience of those interested.

Section 13. Notice to Claimants.—It shall be the duty of said division superintendent to send by registered mail to each person, firm or corporation, hereinafter to be designated as claimant, claiming the right to the use of any of the waters of said stream, and to each person, firm or corporation owning or being in possession of lands bordering on and having access to said stream or its tributaries, insofar as such claimants and owners and persons in possession can reasonably be ascertained, a similar notice setting forth the date when the State Engineer or his assistant will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when the super-

intendent will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty (30) days prior to the date set therein for making the examination of the stream or the taking of testimony.

Section 14. Statement of Claimant.—The division superintendent shall, in addition, inclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following:

The name and postoffice address of the claimant.

The nature of the right or use on which the claim is based.

The time of initiation of such right or the commencement of such use, and if distributing works are required.

The date of beginning of construction.

The date when completed.

The date of beginning and completion of enlargements.

The dimensions of the ditch as originally constructed and as enlarged.

The date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the amount and general location of the land such ditch is intended to irrigate.

The character of the soil and the kind of crops cultivated, and such other facts as will show a compliance with the law in acquiring the right.

Section 15. Statement To Be Under Oath.—Each claimant or owner shall be required to certify to his statements under oath, and the superintendent of the water division in which the testimony is taken is hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

Section 16. Testimony Taken by Division Superintendent.—Upon the date named in the notice provided for herein for the taking of testimony, the division superintendent shall begin the taking of such testimony and shall continue until completed. In case the division superintendent of any water division is directly or indirectly interested in the water of any stream of his division, or is prevented by illness or otherwise from the taking of such proofs, the taking of testimony so far as relates to said stream shall be under the direction of any other member of the Board of Control.

Section 17. Fees.—At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the division superintendent shall collect from each of the claimants or owners a fee of one dollar for the purpose of recording the water right certificate, when issued, in the office of the county clerk, together with the additional fee of fifteen cents for each acre of irrigated lands up to and including 100 acres, and five cents per acre for each acre in excess of 100 acres up to and including 1,000 acres, and one cent for each acre in excess of 1,000; also 25 cents for each theoretical horsepower up to and including 100 horsepower, and fifteen cents for each horsepower in excess of 100 up to and including 1,000 horsepower, and five cents for each horsepower in excess of 1,000 horsepower up to and including 2,000 horsepower, and two cents for each horsepower in excess of 2,000 horsepower, as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be $2.50, also a fee of five dollars for any other character of claim to water. All fees collected by the division superintendent shall be accounted for at the following regular meeting of the Board of Control and paid by such board into the general fund of the State Treasury, except, however, those fees due, or to be paid to the county clerk. But in cases of appropriations of water made under a permit issued under the provisions of this act, only one dollar recording fee above provided shall be so collected by the division superintendent.

Section 18. Notice Upon Completion of Testimony.—Upon the completion of the taking of testimony by the division superintendent, it shall be his duty at once to give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or owners, and said superintendent shall keep said evidence open to inspection at said places not less than ten days, and such other time as fixed in the notice. Said superintendent shall also state in said notice the county in which the determination of the Board of Control will be heard by the circuit court; provided, that said cause shall be heard in the county in which said stream or some part thereof is situate.

Section 19. Contests.—Should any person, corporation or persons owning any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations, who have submitted their evidence to the superintendent as aforesaid, such persons, corporations or associations, shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the superintendent in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said division superintendent shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

Section 20. Hearing.—Said superintendent shall also fix the time and place for the hearing of said contest, which date shall not be less than thirty nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the circuit courts of this state. Superintendents of water divisions

shall have power to adjourn hearings from time to time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the circuit courts of the State, and shall have the power to compel such witnesses so subpoenaed to testify and give evidence in said matter, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

Section 21. Contests; Deposit Required.—The superintendent shall require a deposit of five dollars from each party for each day he shall be so engaged in taking evidence of said contest. Upon the final determination of the matters by the Board of Control, an order shall be entered directing that the money so deposited shall be refunded to the persons, associations or corporations in whose favor such contest shall be determined, and that all moneys deposited by other parties therein shall be turned over by the superintendent to the Board of Control, who shall pay the same into the general fund of the State Treasury upon adjournment of each regular meeting of the board.

Section 22. Evidence Transmitted.—Upon the expiration of the period for which the evidence is kept open for inspection, the evidence in the original hearing before the superintendent, and the evidence taken in all contests, shall be transmitted by the superintendent to the office of the Board of Control in person, or by registered mail. Such evidence shall thereupon be filed with the board.

Section 23. Measurements of Streams and Ditches.—It shall be the duty of the State Engineer, or some qualified assistant, to proceed at the time specified in the notice to the parties on said stream to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream and of the carry-

ing capacity of the various ditches and canals, and examination of the irrigated lands; and an approximate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said observation and measurement shall be reduced to writing and made a matter of record in his office, and it shall be the duty of the State Engineer to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptable of irrigation from the ditches and canals already constructed.

Section 24. Order Determining Water Rights.—As soon as practicable after the compilation of said data, and the filing of said evidence, it shall be the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several rights to the waters of said stream. As soon as practicable thereafter a certified copy of said determination shall be filed in the office of the county clerk of each county in which said stream, or any part thereof or any tributary, is situated, and the original evidence filed with the Board of Control shall be certified by the clerk of the board and, together with a certified copy of said determination, shall be filed with the clerk of the circuit court by which court such determination is to be heard. The determination of the board shall be in full force and effect from the date of its entry in the records of the board, unless and until its operation shall be stayed by a stay bond as provided for by this act. Upon the filing of the evidence with the circuit court of the county in which the determination is to be had, the board shall procure an order from said circuit court, or any judge thereof, fixing the time at which the determination shall be heard in said court. Copies of this order, certified by the clerk of said court,

shall be filed by the board as soon as practicable in the office of the county clerk of each county in which said determination is filed.

Section 25. Water Right Certificate.—Upon the final determination of the rights to the waters of any stream, it shall be the duty of the secretary of the Board of Control to issue to each person, association or corporation represented in such determination a certificate to be signed by the president of the Board of Control, and attested under seal by the secretary of said board, setting forth the name and postoffice address of the owner of the right; the priority of the date, extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant. Such certificate shall be transmitted by the president, or other member of the Board of Control, in person or by registered mail, to the county clerk of the county in which such right is located, and it shall be the duty of the county clerk upon receipt of the recording fee of one dollar collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificate to the respective owners.

Section 26. Court Procedure.—From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be as nearly as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. Within thirty days from the filing of such evidence and order in the circuit court, or within such further time as the court may for good cause allow, any party may file exceptions to the determination. If no exceptions shall be filed, the court shall on the day set for hearing enter a decree affirming the determination of the board.

All parties may be heard by counsel upon the consideration of the exceptions. The court may, if necessary, remand the case for such further evidence to be

taken by the superintendent of the water division as it may direct, and may require a further determination by the board. After the hearing, the court shall enter a decree affirming or modifying the order of the Board of Control. Upon the hearing, the court may assess and adjudge against any party such costs as it may deem just. Appeals may be taken to the supreme court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within sixty days from the entry of the decree.

Section 27. Clerk Shall Transmit Transcript to Clerk of Board.—The clerk of the circuit court, immediately upon the entry of any decree by the circuit court or by the judge thereof, shall transmit a certified copy of said decree to the secretary of the Board of Control. The secretary shall immediately enter the same upon the records of such office and the State Engineer shall forthwith issue to the superintendent or superintendents of water divisions instructions in compliance with the said decree, and in execution thereof.

Section 28. Distribution.—During the time the hearing of the order of the Board of Control is pending in the circuit court, and until a certified copy of the judgment, order or decree of the circuit court is transmitted to the Board of Control, the division of water from the stream involved in such appeal shall be made in accordance with the order of the board.

Section 29. Stay Bond.—At any time after the determination of the board has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond in the circuit court wherein such determination is pending in such amount as the judge thereof may prescribe, conditioned that such party will pay all damages that may accrue by reason of such determination not being enforced. Immediately upon the filing and approval of such bond, the clerk of the circuit court shall transmit to the Board of Control a certified copy of such bond, which shall be recorded in the records by such board, and the State Engineer

shall immediately give notice thereof to the superintendent of the proper water division.

Section 30. Rehearing.—Within six months from the date of the decree of the circuit court determining the rights upon any stream, or if appealed within six months from the decision of the supreme court, the Board of Control, or any party interested, may apply to the circuit court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for the rehearing, the circuit court, or judge thereof, shall make an order fixing a time and place when such application shall be heard. The clerk of the circuit court shall, at the expense of the petitioner, forthwith mail written notice of said application to the Board of Control and to every party interested, and state in such notice the time and place when such application will be heard.

Section 31. Authorized to Administer Oaths.—The members of the Board of Control may administer oaths in the performance of their official duties.

Section 32. Fees.—The secretary of the Board of Control shall collect the following fees, which shall be paid in advance, and accounted for to the board, which fees shall be paid into the general fund of the State Treasury by such board at the adjournment of each regular meeting: for making transcripts of the records of the Board of Control or of papers or documents filed with said board, one dollar for the first folio and ten cents for each additional folio. For attaching certificate and seal of the board to each transcript, one dollar.

Section 33. Conclusive, When.—The determinations of the Board of Control as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

Section 34. Duty of Water Right Claimants.—When

ever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claim shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings may at any time prior to the expiration of one year after the entry of the determination of the board file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had no actual knowledge or notice of the pendency of said proceedings. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

Section 35. Proof Open to Inspection; Who May Contest.—Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the records of such determination that it had not been at one and the same proceeding, then in such case the Board of Control may open to public inspection, all proofs or evidence of rights to the water, and the findings of the board in relation thereto in the manner provided in Section 18; and any persons, corporations, or associations who may desire to contest the claims or rights of other persons, corpor-

ations, or associations, as set forth in the proofs or established by the board, shall proceed in the manner provided for in Sections 19, 20 and 22; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

WATER MASTERS.

Section 36. Districts.—The Board of Control shall divide each water division into water districts, and said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water district shall not be created until a necessity therefor shall arise, but shall be created from time to time as the claims thereof from the streams of the State shall be determined.

Section 37. Water Master; How Appointed.—There shall be appointed by the Board of Control, one water master for each water district, who shall be a resident of the district he is appointed for and who shall have been a resident of said district for one year immediately prior to the date of his appointment, shall be selected from persons recommended by the superintendent of the water division in which such water district is situated. Each water master shall hold his office until his successor is elected and shall have qualified, and the Board of Control shall, by like selection and appointment, fill all vacancies which shall occur in the office of water master.

Section 38. Duty of Water Master.—It shall be the duty of the said water masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights

existing from said streams of his district. The water master shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir, where rights have been determined, in accordance with existing decrees. Whenever, in the pursuance of his duties, the water master regulates a headgate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such headgate or controlling works, a written notice properly dated and signed, setting forth the fact that such headgate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the district attorney to appear for, or on behalf of the division superintendent or any water master in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said district attorney.

Section 39. Water Master Shall Prevent Waste.—Said water master shall, as near as may be, divide, regulate and control the use of the water of all streams within his district by such closing or partially closing of the headgates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water master, shall have the right to appeal to the circuit court for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water master has failed to carry into effect the order of the board of control or decrees of the court determining the existing rights to the use of water.

Section 40. Pay of.—Each water master herein provided for shall receive compensation at the rate of $5.00 per day for each day he shall be actively employed in the duties of his office. Where the service may be improved by continuous employment and upon recommendation of the division superintendent and the approval of the county court of the county, or counties,

in which said district is located by an order, or orders, made at regular term, or terms, thereof when sitting for the transaction of county business he shall receive pay at the rate of $100.00 per month, in either case to be paid by the county in which the work is performed. Each water master shall keep a true and just account of time spent by him in the duties of each county, respectively, in which his duties may extend, and he shall present a true copy thereof, verified by oath, to the county court sitting for the transaction of county business of the county in which his work may be performed. And the county court shall, upon approval thereof by the superintendent of the water division, allow and pay the same. *Provided,* any water master may be suspended by an order of the county court of any county in which his district may lie in case said court shall find and enter an order to the effect that said water master is claiming more time than the public service requires, and during such suspension such water master shall receive no pay.

Section 41. Employment of Assistants.—Said water master shall have power, in cases of emergency, to employ suitable assistants to aid him in the discharge of his duties. Such assistants shall take the same oath as the water master, and shall obey his instructions, and each shall be entitled to such compensation as his services may demand and as the superintendent may recommend, not to exceed in any case, four dollars per day for each day he is employed, such payments to be made upon certificates of the division superintendent in the same manner as provided for the payment of the water master. The term of service of such assistant water master may be terminated at any time by the division superintendent, and shall in no event continue after the emergency has ceased to exist.

Section 42. Water Masters to Begin Work, When.—When arrangements are not made for employment of a water master at a monthly rate, as provided in Section 40 of this act, the said water master shall begin his work upon written demand being made upon

him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water master for work within his district whenever the necessity therefor may in his judgment arise.

Section 43. Interference With Headgate; Penalty.—Any person who shall willfully open, close, change or interfere with any lawfully established headgate or water box without authority, or who shall willfully use water or conduct water into or through his ditch which has been lawfully denied him by the water master or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water master or other competent authority shall be *prima facie* evidence of the guilt of the person using it.

Section 44. Power of Arrest.—The water master, or his assistants, within his district shall have power to arrest any person or persons violating any of the provisions of this act and turn them over to the sheriff or other competent police officer within the county; and immediately upon delivering any such person so arrested into the custody of the sheriff, it shall be the duty of the water master making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

PROCEDURE RELATIVE TO THE APPROPRIATION OF WATER.

Section 45. Application.—Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing or controlling

works, or performing any work in connection with said construction, or proposed appropriation, make an application to the State Engineer for a permit to make such appropriation. Any person who shall willfully divert or use water to the detriment of others without compliance with law, shall be deemed guilty of a misdemeanor. The possession or use of water, except when a right of use is acquired in accordance with law, shall be *prima facie* evidence of the guilt of the person using it.

Section 46. Applications, Nature of.—Each application for permit to appropriate water shall set forth the name and postoffice address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed ditch, canal, or other work, the time within which it is proposed to begin construction, the time required for completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivisions of the land and the acreage to be irrigated, as near as may be. If for power purposes, it shall give the nature of the works by means of which the power it to be developed, the head and amount of water to be utilized, and the uses to which the power is to be applied. If for the construction of a reservoir, it shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be, the future requirements of the city. If for mining purposes, it shall give the nature of the mines to be served, the methods of supplying and utilizing the water. All applications shall be accompanied by such maps and drawings, in duplicate, and such other data as may hereafter be prescribed by the Board of Control, and such accompanying data shall be considered as a part of the application.

Section 47. Applications, Approval of.—Upon receipt of an application, it shall be the duty of the State

Engineer to make an indorsement thereon of the date of its receipt and to keep a record of the same. If upon examination the application is found to be defective, it shall be returned for correction or completion, and the date of, and reasons for the return thereof, shall be indorsed thereon and made a record in his office. No application shall lose its priority of filing on account of such defects, provided acceptable maps and drawings are filed in the office of the State Engineer within thirty days from the date of said return to the applicant. All applications which shall comply with the provisions of this act shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the State Engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the Board of Control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands. An application may be approved for a less amount of water than that applied for, if there exists substantial reasons therefor, and in any event shall not be approved for more water than can be applied to a beneficial use. Applications for muncipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand upon consideration and order by the Board of Control.

Section 48. Application, How Indorsed.—The approval or rejection of an application shall be indorsed thereon and a record made of such indorsement in the State Engineer's office. The application so indorsed shall be returned immediately to the applicant by mail. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works, and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps toward the construction

of the proposed work or the diversion and use of water so long as such refusal shall continue in force.

Section 49. Assignment of Permit.—Any permit or license to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the State Engineer.

Section 50. Limitation on Time of Completing Work. —Actual construction work shall begin within one year from the date of approval of the application and the construction of any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence, and be completed within a reasonable time, as fixed in the permit, not to exceed five years from the date of such approval. The Board of Control shall, for good cause shown, extend the time within which irrigation or other works shall be completed, or the right perfected, under any permit which may be submitted for its consideration by the State Engineer.

Section 51. Appeals.—Any applicant may appeal to the Board of Control for relief, which board may modify the decisions of the State Engineer if it shall appear that he has abused the authority reposed in him by law. Such appeal shall be taken within 30 days from the date of such decision by the State Engineer, and shall be perfected when the applicant shall have filed in the office of the board a copy of the order appealed from, together with a petition setting forth the appellant's reason for appeal, and such appeal shall be heard and determined upon such competent proof as shall be adduced by the applicant, and such like proofs as shall be adduced by the State Engineer. The State Engineer shall not sit as a member of the board on such appeal.

Section 52. Fees.—The following fees shall be collected by the State Engineer in advance, and be paid by him into the general fund of the State Treasury on the last day of March, June, September and December of each year:

(a) For examining an applicant for permit to appropriate water, three dollars.

(b) For filing and recording permit to appropriate water for irrigation purposes, fifteen cents per acre for each acre to be irrigated up to and including one hundred acres, and five cents per acre for each acre in excess of one hundred and up to and including one thousand acres; and one cent per acre for each acre in excess of one thousand acres, or in case the application is for power purposes, twenty-five cents for each theoretical horsepower to be developed up to and including one hundred, and ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horsepower in excess of one thousand; or, in case the application is for any other purpose, including applications by municipalities for power purposes, five dollars for filing and recording each permit.

(c) For filing or recording any other water right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof.

(d) For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds $5.00, then only the actual cost in excess of that amount shall be charged.

(e) For certifying to copies, documents, records, or maps, one dollar for each certificate.

(f) For blue print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

Section 53. Water Right Certificate.—Upon it being made to appear to the satisfaction of the Board of Control that any appropriation has been perfected in accordance with the provisions of this act, it shall be the duty of the Board of Control to issue to the applicant a certificate of the same character as that described in Section 25. Said certificate shall be recorded and transmitted to the applicant as provided in said section.

Certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from date of application, subject to a preference right of renewal under the laws existing at the date of expiration of such franchise or right.

Section 54. Date of Right.—The right acquired by such appropriation shall date from the filing of the application in the office of the State Engineer.

Section 55. Headgate, Maintenance of.—The owner or owners of any ditch or canal shall maintain, to the satisfaction of the division superintendent of the division in which the irrigation works are located, a substantial headgate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water master; and such owners shall construct and maintain when required by the division superintendent, suitable measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water master in determining the amount of water that is to be diverted into said ditch from the stream, or taken from it by the various users. Any and every owner or manager of a reservoir, located across or upon the bed of a natural stream, shall be required to construct and maintain, when required by the division superintendent, a measuring device of a plan to be approved by the State Engineer, below such reservoir, and a measuring device above such reservoir on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the water master or superintendent in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriators' use. When it may be necessary for the protection of other water users, the division superintendent may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such headgates, flumes or measuring devices after ten days' notice, the division superintendent may

close such ditch, and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of headgates lawfully closed, until the requirements of the division superintendent as to such headgate, flumes or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect or refuse to put in such measuring device after ten days' notice by the division superintendent, such superintendent may open the sluice gate or outlet of such reservoir and the same shall not be closed under penalties of the law for changing or interfering with headgates, until the requirements of the division superintendent as to such measuring devices are complied with.

Section 56. Engineer's Authority to Inspect.—The State Engineer shall have authority to examine and inspect, during construction, any dam, authorized under the provision of this chapter, or any ditch, canal or other work, and at the time of such inspection, or thereafter, he shall notify the parties constructing such dam, or other works, of any addition or alteration which he considers necessary for the security of the work or the safety of any person or persons residing on or owning land in the vicinity of such works, or for the safety of their property.

Section 57. Inspection; When Required.—Should any person or persons residing on or owning land in the neighborhood of any irrigation works after completion, or in course of construction, apply to the State Engineer in writing desiring an inspection of such works, the State Engineer may order an inspection thereof. Before doing so he may require the applicant for such inspection to make a deposit of a sum of money sufficient to pay the expenses of an inspection, and in case the application appears to him not to have been justified, he may cause the whole or part of such expenses to be paid out of such deposit. In case the application appears to the State Engineer to have been justified, he may require the owner of the works to pay the

whole or any part of the expenses of the inspection, and the same shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens.

RESERVOIRS.

Section 58. Procedure Under Reservoir Permit.—All applications for reservoir permits shall be subject to the provisions of Sections 45 to 51, both inclusive, except that an enumeration of any lands proposed to be irrigated under this act shall not be required in the primary permit. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known herein as the secondary permit, in compliance with the provisions of Sections 45 to 51, both inclusive. Said application shall refer to such reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application. When beneficial use has been completed and perfected under the secondary permit, the division superintendent shall take the proof of the water user under such permit and the final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

Section 59. Duty of Water Master and Costs; How Payable.—Whenever the owner, manager or lessee of a reservoir, constructed under the provisions of this act shall desire to use the bed of a stream, or other water-course, for the purpose of carrying stored or impounded water from the reservoir to the consumer thereof, he shall, in writing, notify the water master of the district, in which the stored or impounded water is to be used, giving the date when it is proposed to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. It shall then be the duty of such water master to close, or so adjust the headgates of all ditches from the

stream or watercourse, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled. The water master shall keep a true and just account of the time spent by him in the discharge of his duties as defined in this section, and it shall be the duty of the county commissioners of the county wherein the expense is incurred, to present a bill of one-half the expense so incurred to the reservoir owner, manager or lessee, and if such owner, manager or lessee shall neglect for thirty days, after the presentation of such bill of costs, to pay the same, the said costs shall be made a charge upon said reservoir and shall be collected as delinquent taxes until the complete payment of such bill of costs has been made.

Section 60. Attorney-General and District Attorneys Advisors of State Engineer.—The Attorney-General and the district or prosecuting attorney of the county in which legal questions arise, shall be the legal advisors of the State Engineer and of the Board of Control, and shall perform any and all legal duties necessary in connection with their work, without other compensation than their salaries as fixed by law.

Section 61. Joint Owners; Responsibility.—In all cases where ditches are owned by two or more persons and one or more of such persons shall fail or neglect to do a proportionate share of the work necessary for the proper maintenance and operation of such ditch or ditches or to construct suitable headgates or measuring devices at the points where water is diverted from the main ditch, such owner or owners desiring the performance of such work may, after having given ten days' written notice to such other owner or owners, who have failed to perform such proportionate share of the work, necessary for the operation and maintenance of said ditch or ditches, perform such share of the work, and recover therefor from such person or persons in default the reasonable expense of such work.

Section 62. Lien for Work Performed on Ditch.—Upon the failure of any co-owner to pay his propor-

tionate share of such expense, as mentioned in the preceding section, within thirty days after receiving a statement of the same as performed by his co-owner or owners, such person or persons so performing such labor may secure payment of said claim by filing an itemized and sworn statement thereof, setting forth the date of the performance and the nature of the labor so performed, with the county clerk of the county wherein said ditch is situated, and when so filed it shall constitute a valid lien against the interest of such person or persons in default, which said lien may be established and enforced in the same manner as provided by law for the enforcement of mechanics' liens.

Section 63, Regulation of Partnership Ditches and Reservoirs.—When two or more persons, joint owners in an irrigation ditch or reservoir, not incorporated, or their lessees, are unable to agree relative to the division or distribution of water received through their ditch or from their reservoir, it shall be lawful for any such owner or owners, his or their lessee or lessees, or either of them, to apply to the water master of the district in which such ditch or reservoir shall be located, by a written notice setting forth such fact, asking the water master to take charge of such ditch or reservoir for the purpose of making a just division or distribution of the water from the same, to the parties entitled to the use thereof. The said water master shall take exclusive charge of such ditch or reservoir for the purpose of dividing the water therefrom in accordance with established rights, and continuing the said work until the necessity therefor shall cease to exist. In all cases where the water master or an assistant water master is called upon to divide the waters of a ditch or reservoir between appropriators, he shall be paid in full for his services by the interested water users in proportion to the established rights of each, and shall have a lien upon any land irrigated by the water owned by an interested water user refusing to pay, said lien to be established and enforced in the same manner as a mechanics' lien.

Section 64. Injunctions.—In suits for injunction

affecting the use of water from streams upon which the rights to water have been determined, no restraining order shall be granted before hearing had after at least three days' notice thereof, served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed.

Section 65. Water Appurtenant to Land for Irrigation Purposes.—All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; *provided*, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land; and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control. Before the approval of such transfer an inspection shall be made by the proper division superintendent, who shall submit his report to the Board of Control, whereupon, by order, the board shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided.

Section 66. Unlawful Use of Water and Waste.—The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor, and the possession or use of such water without legal right, shall be *prima facie* evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters.

Section 67. Obstructing Works.—Whenever any appropriator of water has the lawful right of way for the storage, diversion, or carriage of water, it shall

be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor.

Section 68. Penalty for Misdemeanors Under This Act.—All violations of the provisions of this act, declared herein to be misdemeanor, shall be punished by a fine not exceeding two hundred and fifty dollars nor less than ten dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

Section 69. Appropriations.—There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $10,000 annually, or so much thereof as may be necessary for the payment of the salaries and expenses incurred by the Board of Control under the provisions of this act.

There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated the sum of $5,000 annually, or so much thereof as may be necessary for the salary and expenses of the State Engineer, and the services of assistants, and expenses of the office and department of the State Engineer, which appropriation is in addition to the $5,000 annual appropriation heretofore made in Chapter 228, Session Laws of 1905.

All salaries and expenses incurred, and material and supplies furnished under the provisions of this act shall be paid at the same time and in the same manner as those of other officers of the State.

Section 70. Vested Rights Preserved.—

1. Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.

2. Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest, shall be deemed to create in such riparian proprietor a vested right to

the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years.

3. And where any riparian proprietor, or under authority of any riparian proprietor or his or its predecessor in interest, any person or corporation shall, at the time this act is filed in the office of the Secretary of State, be engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in such riparian proprietor; provided, such works shall be completed and said water devoted to a beneficial use within a reasonable time after the passage of this act. The Board of Control, in the manner hereinafter provided, shall have power and authority to determine the time within which such water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the Board of Control.

4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

5. Nor shall the right of any person, association or corporation, to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in the office of the Secretary of State, and such appropriators, their heirs, successors or assigns, shall, in good faith and in compliance with laws existing at the time of filing this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

6. The Board of Control shall have authority, and shall for good cause, shown upon the application of

any appropriator, or user of water under an appropriation of water made prior to the passage of this act, or in the cases mentioned in subdivisions 3 and 5 of this section, where actual construction work has been commenced prior to said time or within the time provided in law existing at the time of filing this act in the office of the Secretary of State, to prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use, and in determining said time shall grant a reasonable time after the construction of the works, or canal, or ditch, used for the diversion of the water, and in doing so shall take into consideration the cost of the appropriation and application of such water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. Upon making such order the Board of Control shall direct the State Engineer to issue a certificate showing such determination. For good cause shown the Board of Control may extend the time by granting further certificates.

7. And where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction of improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording, or publication thereof.

8. All rights granted or declared by this act shall be adjudicated and determined in the manner and by the tribunals as provided in this act. This act shall not be held to bestow upon any person, association, or corporation, any riparian rights where no such rights existed prior to the time this act takes effect.

Section 71. Portland Water Supply.—The exclusive right to the use of the waters of Bull Run and Little Sandy rivers is hereby granted to the city of Portland,

and all rights to the waters of the lakes, rivers and streams of this State heretofore acquired for the purposes of municipal water supply are hereby confirmed, and no rights which shall be acquired under this act shall impair the rights of any municipal corporation to waters heretofore taken. The Board of Control shall reject, or grant subject to municipal use, all applications where, in its judgment, the appropriation of the waters applied for impair a municipal water supply. It shall be the duty of municipal corporations of the State, on request of the State Engineer, to furnish to him a statement of the amount and source of the municipal water supply, with probable increase or extension of the same; provided, that this act shall not be deemed or held to and shall not impair the rights of any person, association or corporation who may, at and prior to the time this act is filed in the office of the Secretary of State, have any vested right to or valid appropriation or bona fide notice of appropriation of the waters of either the Bull Run or the Little Sandy river, under laws heretofore in effect or under any valid contract or deed of conveyance heretofore made with or by the city of Portland.

Section 72. Eminent Domain.—The United States, the State, or any person, foreign or domestic corporation or association, may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public use.

The right to conduct water from or over the land of another for any public use, including the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same

available for the use intended; and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use.

Section 73. Repeal.—All laws and parts of laws so far as in conflict or inconsistent with the provisions of this act are hereby repealed.

Section 74. Emergency.—WHEREAS, there is great uncertainty existing throughout the State with reference to the water rights of various parties along the streams, ditches and waterways as to their several interests therein, entailing expensive litigation and engendering many animosities and much bad blood, thereby endangering the public peace and safety of many sections of the State, and WHEREAS, it is urgent that these conditions be remedied for the preservation of the public peace, health and safety of the State, this act shall be in full force and effect from and after its approval by the Governor.

Filed in the office of the Secretary of State February 24, 1909.

POLICE POWER—EMERGENCY CLAUSE

The Emergency Clause attached to the foregoing Water Code of 1909, Section 74, thereof, is cited in the majority opinion (R. 444; 73 Fed. 2d 567) as establishing that said Water Code purported to be exercise of the police power of the State. The language of the Opinion is:

> "The Oregon Code of 1909 itself purported to be an exercise of the police power of the State, as shown by Section 74. Emergency."

At the time of the passage of the Act, the emergency clause was used to prevent laws being referred to the people under what the Oregon Constitution calls the

"Referendum." That was practically the sole use of the emergency clause of the Act, set forth in the majority opinion.

In fact Colorado, Arizona, Ohio, and other states which borrowed from Oregon their referendum provisions of their constitutions, followed the doctrine of the Supreme Court of Oregon as announced in the *Kadderly* case, cited below.

OREGON REFERENDUM AMENDMENT

The initiative and referendum amendment to the Oregon Constitution is an amendment of Article IV and follows: (June 2nd, 1902).

Oregon Code Annotated, official edition 1930, Volume 1, page 96.

"ARTICLE IV.

LEGISLATIVE DEPARTMENT.

§ 1. Legislative authority—Style of bill—Initiative and referendum. The legislative authority of the state shall be vested in a legislative assembly consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. *The*

second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded * * *."

tion 28 of Article IV of the Oregon Constitution, said Volume I, Oregon Code, page 120, reads:

"§ 28. When act to take effect.—No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law."

THE KADDERLY CASE

The use of the emergency clause is not a legislative declaration that the act is the exercise of the state police power.

The following quotations from the Kadderly case, and those citing it follow.

Kadderly v. Portland, 44 Or. 118 (*Dec.* 1903), (74 Pac. 710, 75 Pac. 222).

Quotation from Point 10, pages 146 to 151, inclusive, of the Oregon Report:

"10. This brings us to the question as to whether the legislative declaration that the Portland charter was necessary for the preservation of the public peace, health, and safety is conclusive on the courts. Under the initiative and referendum

amendment, laws 'necessary for the immediate preservation of the public peace, health, or safety' are excepted from its operation. *As to them, the action of the legislative and executive departments is conclusive and final, so far as their enactment is concerned. No power is reserved to the people to approve or disapprove them.* They are not subject to the referendum amendment, and as to them the powers of the other departments of the government derived from the constitution are unaffected. The legislative assembly may, in its discretion, put them into operation through an emergency clause, as provided in the Constitution of Oregon, Article IV, § 28, or it may allow them to become laws without an emergency clause, the necessity or expediency of either course being a matter for its exclusive determination. As to all other laws the amendment applies, and they cannot be made to go into operation for 90 days after the adjournment of the session at which they were adopted, or until after approval by the people if the referendum is invoked. The Constitution of Oregon, Article IV, § 28, giving the legislative assembly power to put any law into force upon approval by declaring an emergency, has been modified by the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety. So far, all are agreed. But the vital question is, what tribunal is to determine whether a law does or does not fall under this classification? Are the judgment and findings of the legislative assembly conclusive, or are they subject to review by the courts? *The inquiry is much simplified by bearing in mind that the exception in the constitutional amendment is not confined to such laws as the legislative assembly may legally enact by virtue of the police powers of the State, or to those alone that may affect the public peace, health, or safety. The police power is limited to the imposition of*

restraints and burdens on persons and property, in order to secure the general comfort, health, and prosperity of the state: Tiedeman, Lim. Pol. Power, § 1. *But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety, whether they impose restraints on persons and property, or come strictly within the police powers, or not.* The laws excepted from the operation of the amendment do not depend alone *upon their character,* but upon the necessity for their enactment in order to accomplish certain purposes. *As to such laws the amendment of* 1902 *does not in any way abridge or restrict the power of the legislature, which, by the insertion of a proper emergency clause, may unquestionably cause them to go into effect upon approval by the Governor.* As the legislature may exercise this power when a measure is in fact necessary for the purposes stated, and as the amendment does not declare *what shall be deemed laws of the characted indicated,* who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety.

It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency, or necessity of any given law is conclusive on the courts, and cannot be reviewed or called in question by them. *It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. The powers of the courts do not extend to*

the mere question of expediency, or *necessity,* but, as said by Mr. Justice Brewer, 'they are wrought out and fought out in the legislature and before the people. Here the single question is one of power. We make no laws. We change no constitutions. We inaugurate no policy. When the legislature enacts a law, the only question which we can decide is whether the limitations of the constitution have been infringed upon': Prohibitory Am. Cas. 24 Kan. 700, 706. The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final: *Biggs v. McBride,* 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Umatilla Irrig. Co. v. Barnhart,* 22 Or. 389 (30 Pac. 37); *Gentile v. State,* 29 Ind. 409; *Wheeler v. Chubbuck,* 16 Ill. 361; *Sutherland,* Stat. Const. 108."

Cameron v. Stevens, 121 *Or.* 538 (1927), 256 Pac. 395.

Quotation from Oregon Report, 544-5:

"5-8. The effect of an emergency clause upon acts passed by the legislature is to cause the act to take effect at once upon its approval by the Governor and to *prevent its not going into effect* until after the expiration of the period otherwise prescribed by the Constitution. *What* may be deemed an emergency for this purpose is purely a legislative question. The courts will not inquire into it, nor entertain any question of its sufficiency: 1 *Lewis' Sutherland on Statutory Const.* (2 ed.), § 176. Hence, it would *seem to follow that unless expressly prohibited by some constitutional provi-*

sion, the legislature has as much power to prescribe when an act shall take effect as it has to enact the law itself, and that in order to make it take effect at once, it has the power to declare an emergency, and when so declared the act is not subject to the referendum powers of the people."

COLORADO

Shields et al v. City of Loveland et al, 74 Colo. 27, (July 2, 1923), 218 Pac. 913.

Quotation from the Pacific Reporter reference, page 915:

"*Article 5 of our Constitution is borrowed from Oregon almost literally,* and at the time of its adoption the Oregon courts had already held on this point in favor of the defendants in error, *Kadderly v. Portland,* 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and later in *Thielke v. Albee,* 79 Or. 48, 153 Pac. 793, and so we held. See *Van Kleeck v. Ramer,* 62 Colo. 4, 156 Pac. 1108; *People v. Ramer,* 61 Colo. 422, 158 Pac. 146; *In re Senate Resolution,* 54 Colo. 262, 130 Pac. 333. So. Ohio, *Shyrock v. Zanesville,* 92 Ohio St. 375, 110 N. E. 937."

In re Senate Resolution Number 4, Supreme Court of Colorado, (Feb. 28, 1913), 54 Colo. 262, 130 Pac. 333.

Quotation from Pacific Reporter reference, page 336, Point 3:

"(3) The next question is, Can the General Assembly lawfully prevent the proposed act from being *referred* by the declaration contained in section 6 thereof? To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the 'Referendum' 'may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety.' Whether a law is of this character is for the General Assembly to determine, and, when it so determines, by a declaration to that effect in the

body of a proposed act, we are of the opinion that *such declaration is conclusive upon all departments* of government, and all parties, in so far *as it abridges the right, to invoke* the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by Article 5, § 19."

To the same effect is

Van Kleeck v: Ramer, 62 Colo. 4, 156 Pac. 1108 (Apr. 3, 1916).

ARIZONA

Arizona has a similar referendum amendment, similarly construed. In its Supreme Court in defining the office of the emergency clause, with reference to its referendum, it cited with approval and followed the Oregon case of Kadderly vs. Portland, in

Orme v. Salt River Water Users' Association, 25 Ariz. 324, 217 Pac. 935 (1923).

OHIO

Ohio took its referendum provision from the Oregon Constitution, as stated in

State ex rel. Durbin v. Smith, 102 Ohio State, 591, 133 N. E. Rep. 457 (June 16, 1921).

It cited with approval and followed the Kadderly case, supra.

OREGON LEGISLATIVE RECOGNITION OF RIPARIAN RIGHTS ARISING FROM THE LOCATION OF RIPARIAN LANDS ALONG THE STREAMS.

LAWS OF OREGON, 1891,

Page 52. Act approved February 18th, 1891.

An Act entitled: "An Act to provide for the appro-

piation of water from the lakes and running streams of the State of Oregon" * * * * * "*allowing the condemnation of rights of riparian proprietors arising from their locations;*" * * * *.

"Sec. 8. Such corporation may also *maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location.* Such actions shall be brought in the county where the lands to be affected or some portion thereof are situated, and the manner of procedure therein shall be similar to that prescribed in the preceding section for condemnation of lands; *but no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use,* or for the purpose of watering his stock, or *of water necessary to* irrigate *crops growing upon such lands, and actually used therefor.*"

OREGON LAWS, 1895,

Page 13. Approved February 20, 1895.

An Act entitled: "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes."

Section 45 provides for a rotation system between users when the water is insufficient to fully supply the needs of all.

"Sec. 48. None of the provisions of this Act shall be construed as repealing or in anywise modifying the provisions of any Act relating to the subject of

irrigation or water commissioners. *Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch or the waters therein, unless previous compensation be ascertained and paid therefor,* under the laws of this state, authorizing the taking of private property for public uses."

OREGON LAWS OF 1899,

Page 172. Act approved February 18th, 1899.

(B. & C. Comp. 5022 et seq.)

An Act entitled: "To provide for the appropriation of water from the lakes and running streams of the State of Oregon for the purpose of developing the mineral resources of the state and for other purposes," * * * * * "allowing the condemnation of rights of riparian proprietors arising from their location; * * *."

"Section 9. Such persons, companies and corporations may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. Such action shall be brought in the county where the . ." (The section is incomplete due to some error in its passage).

The foregoing Section 9 of the Act of February 18th, 1899, was amended in the Special Legislative Session of 1903. In the meantime it had been codified in the C. B. Bellinger and W. W. Cotton "Annotated Codes

and Statutes of Oregon," Volume 2, and as Section 5030 thereof.

The amendment follows:

LAWS OF 1903, SPECIAL SESSION
Page 25. Filed with the Secretary of State,
December 24, 1903.

Entitled: "An Act To Amend Section 5030 of the Laws of Oregon as compiled and annotated by C. B. Bellinger and W. W. Cotton."

As amended:

> "Sec. 5030. Such persons, companies and corporations may also maintain an action *for the condemnation and appropriation of the right to the flow of water in any stream from which it or they propose to divert water below the point of diversion vested in the owners of lands* LYING CONTIGUOUS TO SUCH STREAM BY VIRTUE OF THEIR LOCATION." * * * *

In January, 1905, the Supreme Court of Oregon considered the power of eminent domain clause in this Act, and said:

> "It would seem, however, as authority had been granted to condemn land for a ditch, and also power conferred to condemn the right to have the water of a stream flow in the channel thereof below the point of diversion, *the legislative assembly had not intended to deprive or even abridge the rights of a riparian proprietor.*"

It then added:

> "Condemnation proceedings are purely statutory, and every condition prerequisite to an exercise of the right must be strictly pursued."
> *Grande Ronde Electric Co. v. Drake,* 46 Or. at page 248. (78 Pac. 1031).

OREGON LAWS OF 1901,

Page 136. Act of February 25th, 1901.

An Act entitled: "An Act to amend Section 8 of an Act entitled 'An Act to provide for the appropriation of water from lakes and running streams of the State of Oregon" * * * *; "allowing the condemnation of lands for right of way; prescribing the manner of making appropriations and effecting condemnation of lands; *allowing the condemnation of rights of riparian proprietors arising from their location;* * * * * *."

> "§ 8. Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in the owners of *lands lying contiguous to such stream by virtue of their location.* * * * * *."

OREGON LAWS OF 1905,

Chapter 45, Page 106. Approved February 9, 1905. Oregon Code 1930, § 37-302.

An Act entitled: "An Act to provide for the condemnation of real property, water, water courses, and water and riparian rights by the State of Oregon for public use, for the manner of determining the necessity therefor, and the manner of procedure and making payment therefor."

Section 1. This section provides that whenever it is necessary for the state to acquire any real property, water, water courses, and water and riparian rights, or any interest therein, it may bring, as provided

therein, suit to condemn the same, and for assessment of damages.

This act is still in full force and effect, and it is to be found as above stated in Section 37-302, Oregon Code 1930.

ON ADMISSION, STATE MAY ADOPT OR REJECT COMMON LAW RIPARIAN DOCTRINE

When a state is admitted into the Union, it may determine for itself whether or not it will adopt the common-law doctrine of riparian rights.

Kansas v. Colorado, 206 U. S., pages 46-118, 27 Sup. Ct. 655, 51 L. Ed. 956.

We quote from 206 U. S. at 94-5, as follows:

"It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the *arid regions of the West* of the appropriation of waters for the *purposes of irrigation shall control.* Congress cannot enforce either rule upon any state. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Grey in *United States v. Wong Kim Ark,* 169 U. S. 649, 654, 42 L. Ed. 890, 893, 18 Sup. Ct. Rep. 456, 459:

'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familarly known to the framers of the Constitution. *Minor v. Happersett,* 21 Wall. 162, 22 L. Ed. 627; *Ex parte Wilson,* 114 U. S. 417, 422, 29

L. Ed. 89, 91, 5 Sup. Ct. Rep. 935; *Boyd v. United States,* 116 U. S. 616, 624, 625, 29 L. Ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; *Smith v. Alabama,* 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. The language of the Constitution, as has been well said, could not be understood without reference to the common law. I Kent. Com. 336; Bradley, J.; in *Moore v. United States,* 91 U. S. 270, 274, 23 L. Ed. 346, 347."

THE COMMON LAW ADOPTED ON ADMISSION OF OREGON

Speaking of common law in Oregon, Mr. Justice Gray in

Shively v. Bowlby, 152 U. S. 1, 52 (38 L. Ed. 331, 350), 152 U. S. at 52,

said:

"The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law."

See also:

United States F. & G. Co. v. Bramwell, 108 Or., pages 261-289. *July* 10, 1923 (217 Pac. 332).

Quotation from pages 264-266:

"The common law of England, modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or

in conflict with the Constitution and laws of the United States or of this State, except as modified, changed or repealed by our own statutes, has been adopted and is in force in this state: *Perry v. Fletcher,* 93 Or. 43 (182 Pac. 143).

By Section 2, Article 1 of the Organic Law of the provisional government of Oregon, adopted by the vote of the people on July 26, 1845, it was declared that:

> 'The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law.' * * * * *

"Section 7, Article XVIII of the Constitution, adopted by the people on September 18, 1857, provides that 'All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until *altered or repealed'.*".

In

Fidelity, etc., Co. v. State Bank of Portland, 117 Or. 1, 5. *January* 19, 1926, (242 Pac. 823),

Quotation from page 5:

> *"It is our understanding that we are as much bound by the applicable rules of the common law, where such rules have not been modified, or abrogated by statute, as we are by the statutes themselves."*

OREGON CASES DECIDED PRIOR TO THE ISSUANCE OF PETITIONER'S PATENT:

Petitioner's Patent was Issued April 20, 1885,

Defendants' Exhibit W, (R. 301-3).

James Taylor vs. James Welch, 6th Or., 199, de-

cided during the term from December term, 1876 to December term 1877.

We quote from the opinion 200-201:

"The rules of law applicable to this case seem to be well settled. Every proprietor of land through which flows a stream of water has a right to the use of the water flowing in its natural channel, without diminution or obstruction. (Washburn on Easements, 215.) The same rule applies to water which flows in a well-defined and constant stream in a subterranean channel (Angell on Watercourses, Sec. 112; Washburn on Easements, 364); but it does not apply to water percolating through the soil or even flowing through an unknown and undefined channel. (Washburn on Easements, 210; Washburn on Easements, 364.) These rules, together with the maxim that every person may use his own property as he pleases, provided such use is not an injury to another, are, we think, all the principles of law necessary to a decision of the case. The only question to be decided by us is one of fact. Does the evidence before us prove the existence of a constant and well-defined stream of water flowing in a subterranean channel, swale, spring, or basin on the land of defendant's described in the pleadings and evidence, to the spring described as Taylor and White's springs, in the evidence and upon the maps used in the argument before us, prior to the digging of the ditch complained of?"

This case was followed in a decision rendered at the October Term, 1881, being:

Shively et al vs. Hume et al, 10 Or., 76.

Mr. C. J. Lord, speaking for the Court said:

"There is no dispute as to the principles of law applicable to this case. Both parties cite with approbation Taylor v. Welch, 6 Or., 200, and rely upon the rules of law as therein enunciated as aplicable to, and controlling the facts of this case.

In Taylor v. Welch, supra, it was held that every proprietor of land through which flows a stream of water, has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and that this was equally true of water which flows in a well defined and constant stream in a subterranean channel."

It was also held in said case that the obstruction and diversion of a stream from its course was a private nuisance and justified the interference of equity to prevent such action.

We also make the following quotation from another riparian case, decided at that October Term, 1881.

Shaw vs. Oswego Iron Works, 10th Or., 375-6 from which we copy: (Italics ours)

"Accordingly, streams of water have been divided into several distinct classes. First, Such rivers, or arms of the sea in which the tide ebbs and flows; and in these, which are technically called navigable, the sovereign is the owner of the subjacent soil, *and all right in it belongs exclusively* to the public. Second, Such streams as are navigable in fact for boats, vessels, or lighters; and in these, which are termed public highways, the public have an easement for the purposes of navigation and commerce, *but the title of the subjacent soil to the middle of the stream, and the right to the use of the water flowing over it is in the riparian owner,* subject to the superior rights of the public to use it for the purposes of transportation and trade. Third, Such streams as are so small or shallow as not to be navigable for any purpose; and in these the public have no rights of highway or otherwise, and they are altogether private property."

Morgan vs. Shaw, decided in May, 1884, is valuable here. It was decided a year *prior* to the issuance of peti-

tioner's patent. It deals with the law of riparian rights and with those acquired by appropriation. It is to the effect that the common law riparian rights can only be modified by appropriations made before the initiation of the riparian rights. This is the doctrine of "prior appropriation." Those who seek to confuse, speak of the "modified riparian rights" or "riparian rights modified by appropriation." But when the patent issues the riparian right cuts off the right to make any future appropriations affecting the lands. *Sturr vs. Beck* (cited) from this court is decisive of the point.

There are numerous Oregon decisions made prior to the decision in the Hood River case, to the effect that appropriations can only invade riparian rights on lands patented before the initiation of the appropriation, when the appropriator has, through his appropriation, deprived the riparian lands of the water under an adverse claim of right for the period of prescription, which in Oregon is ten years.

We quote from:

Morgan vs. Shaw, 47 Ore. 33, (83 Pac. 534).

Quotation is from page 337:

> "3. Much importance seems to be placed by defendant upon the averment in his answer that he diverted water from a stream at a point on the public domain, and that as the plaintiff failed to allege such fact in the complaint, he, having given evidence thereof at the trial, had established the better right. *This contention is without merit,* for where, as in this State, the common-law doctrine

of riparian rights, as modified by the rule of prior appropriation, is recognized, it follows that, as Dr. Stevens was a prior settler on public land through which the Middle Fork of Burnt River flowed, and his title to the premises secured from the United States related back to the date of his settlement, that stream was not flowing through public lands when the defendant made his diversion: *Brown v. Baker,* 39 Or. 66 (65 Pac. 799, 66 Pac. 193)."

OREGON CASES CLOSELY FOLLOWING THE ISSUANCE OF PETITIONER'S PATENT.

Petitioner purchased its property in question March 11th, 1921. (R. 180).

Between the date of the issuance of the patent, in 1885, and petitioner's purchase of the property in question, in 1921, to wit: On June 6th, 1886, the Supreme Court decided the Weiss case, which is still the leading Oregon case upon the subject. It is particularly important here because it was followed in Harris vs. Southeast Lumber Co., (quoted elsewhere), decided January, 1928, four years after the decision of the Hood River case. The Weiss case reaffirmed the doctrine of the prior cases, and discussed the common law riparian right in detail, and laid down the doctrine that while a riparian proprietor has the right to the use of the stream as it passes his lands, he cannot divert it from the lands of either riparian proprietor nor substantiatially diminish its quantity. This case is one involving the riparian use of water for mill or power purposes.

We make the following quotation:

Weiss v. Oregon Iron & Steel Company, 13 Or., 496 (11 Pac. 255). (1886).

Quotation from 498-9, 500, 501. And upon the subject of "injunction" from 503: (Italics ours).

"The facts show that one-fifth, or perhaps more, of the water of the stream is diverted from its natural course, and turned away from the other riparian owners. It differs essentially from a case in which a stream is diverted for manufacturing purposes, and the excess water not actually consumed in such use is restored to its natural channel. In a word, it is a case of a diversion of a part of a watercourse, not for ordinary purposes, but for manufacturing purposes, without restoring to the channel the surplus of water not actually used. The general doctrine relating to *watercourses* is, that every proprietor is entitled to the use of the flow of the water in its natural course, and to the momentum of its fall *on his own land*. The owner has no property in the water itself, but a simple usufruct. He may use it as it passes along, but he must send down to his neighbor below as much as he receives from his neighbor above. (Angell on Watercourses, Secs. 90, 94.) 'As a general proposition, every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, without diminution or alteration.' (Washburn on Easements, 319.) 'Riparian proprietors are entitled, *in the absence* of *grant, license,* or *prescription limiting their rights,* to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration.' (Gould on Waters, Sec. 204.) Chancellor Kent says: 'Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it *another direction,* and he must return it to its ordinary channel when it leaves his estate. *Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity*

of water which would otherwise descend to the proprietors below.' (3 Kent's Com., Sec. 439.) 'Aqua currit et debet currere ut currere solebat', is the language of the ancient common law. The right to a watercourse begins ex jure naturae, and having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below. This is the language of all the common-law text books, and the decisions. (Angell on Watercourses, Sec. 93.) 'It is an ancient and well established principle,' said Weston, J., 'that water cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of the proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it.' (Blanchard v. Baker, 8 Greenl. 266.) 'The general rule of law is, that every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration.' (Lord Ellenborough in Bealy v. Shaw, 6 East, 208, 214.)

By settled principles of both the civil and common law, the riparian owner has a usufruct in the stream as it passes over his land, of which he cannot be deprived by mere diversion. (Pope v. Kinman, 54 Cal. 3.) As a result of the American and English cases, the common-law doctrine is thus summed up in the editorial note to Heath v. Williams, 25 Me. 209, S. C., 43, Am. Dec. 275; 'The general principle is, that every owner of land through which a natural stream of water flows has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription.' The defendant, as riparian owner, has a right to the use of the stream

for its own necessary uses, but this right must be reasonably exercised, and there must be no substantial diminution or waste. It is entitled to use only so much of the stream as will not materially diminish its quantity, and it may use it for any legal purpose provided it returns the stream to its channel uncorrupted and without any essential diminution. Such use of a stream by riparian owners is to some extent a question of degree; and in all such cases the size and capacity of the stream is to be considered. The amount taken from a large running stream which would cause no sensible or practical diminution of its benefits to a lower proprietor would, if taken from a small stream, materially diminish its quantity and work a manifest injury. What is a reasonable use must necessarily depend upon the facts, considering the size of the stream and the amount appropriated. *But all the authorities concur that when the amount abstracted perceptibly or materially diminishes the quantity of the stream, such use of it by a riparian owner is unreasonable, and an infringement of the rights of other riparian owners, for which the law furnishes redress. The plaintiff is entitled to have the natural flow of the water in its accustomed channel, subject only to the diminution and retardation incident to a reasonable use.* WHATEVER GOES BEYOND THIS IS AN INFRINGEMENT OF HIS RIGHTS IN THE STREAM WHICH MAY FORM THE BASIS OF A PRESUMPTION OF A GRANT BY LAPSE OF TIME, AND NECESSARILY IMPORTS DAMAGES, AND ENTITLES HIM TO THE PROTECTION OF THE LAW. (PLUMLEIGH V. DAWSON, 1 GILM. 544.) AND MR. ANGELL SAYS: 'THAT A DIVERSION OF A WATERCOURSE, WITHOUT ACTUAL INJURY TO A RIPARIAN OWNER LOWER DOWN THE STREAM, LEGALLY IMPORTS DAMAGES

(BECAUSE IT IS AN INFRINGEMENT OF A RIGHT) IS A DOCTRINE POWERFULLY SUSTAINED BY AMERICAN AUTHORITIES.' (Angell on Watercourses, Sec. 135.) *Now, the counsel for the defendant, while admitting that the rule of the common law as to riparian owners is fatal to the claim of the defendant upon the facts, insists that the rule itself needs to be liberalized,* and that the case presented is a forcible illustration of the hardship and injustice of its operation, and of the duty of the court to so extend or liberalize it as to protect the defendant from the burdens and unjust exactions which must be the consequences of its strict application. His argument in effect is, that the amount of water abstracted and diverted is necessary to carry on the defendant's business, which is a laudable enterprise that deserves, on account of the supposed benefits to accrue from its successful establishment, to be encouraged and protected, and that such use of the water, although it may sensibly diminish the supply of the stream, will leave a sufficient quantity to flow in its accustomed channel for all present and prospective purposes to which the plaintiff can apply it. But as Black, J., said in Wheatly v. Chrisman: *'The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both.* The defendant had a right to such use as he could make of the water without materially diminishing it in quantity .... If he needed more he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he cannot have either unless he first makes it his own' (24 Pa. St. 302.) * * *

Nor do we think the objection to the exercise of the jurisdiction well taken. Mr. High says: 'A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel.

> Nor does the neglect of complainants to use or appropriate the *water-power,* or the fact that they have as yet sustained but small pecuniary damage, or that defendants would be subjected to heavy expense if compelled to restore the water to its original channel, present such objections as would warrant a court of equity in refusing the relief.' (High on Injunctions, Sec. 795, and authorities cited.)"

RIPARIAN RIGHTS AND RIGHTS BY APPROPRIATION ACQUIRED PRIOR TO ENACTMENT OF THE WATER CODE

By the act of 1866, Congress gave formal sanction to water appropriations upon *public* lands. It is said by Wiel, as quoted in the majority opinion at R. 426 (73 Fed. 2nd at 561) that the act gave formal sanction to the prevailing theory of a grant to the holders of existing rights upon public land, and that the statute had chiefly in view the protection of appropriations already made, rather than future ones.

This act was further amended by the act of July 9, 1870. By Section 17 thereof, it was provided that patents granted on preemptions or homesteads should be subject to any vested and accrued water rights which may have been acquired under Section 9 of the Act of July, 1866.

This court in *Sturr v. Beck,* cited below, discussed the comparative rights of such appropriations as compared with the riparian rights of those who settled upon and obtained patent to lands riparian to the same stream.

In *Sturr v. Beck* it was held that when the government ceased to be the sole proprietor, the right of the riparian owner attached and could not be subsequently invaded.

The knowledge of the holding of this court in *Sturr v. Beck* reached the Supreme Court of Oregon while it had under consideration *Faull v. Cooke,* cited below, and the Oregon court held that *Sturr v. Beck* conclusively settled the contentions in *Faull v. Cooke,* that the questions involved were identical, and that the homestead claimant's riparian rights attached from the date of his settlement, provided he complied with the law and obtained the patent, and that such patent related back to the date of the settlement and cut off any right to divert a stream running through the homestead. Because of these interesting circumstances, we quote from these two cases.

Sturr, Appellant, v. Beck, 133 U. S. 541-552, 33 Law Ed. 761. (Decided March 3, 1890).

Quotation from Mr. Chief Justice Fuller, Law Ed. page 763-4-5:

"John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a

water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.

It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water right location claiming the waters of False Bottom Creek, and had never diverted those waters prior to Sturr's location.

If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of *March* 25, 1879, and possession *thereunder,* or if *his patent* took effect as against Sturr by relation as of *that date,* then it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor of a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. * * *

By Section 17 of the Act of July 9, 1870, amen-

datory of the Act of July 26, 1866, it was provided, among other things, that 'all patents granted, or pre-emption or homesteads allowed, shall be subject to any *vested* and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as *may have been acquired* under or recognized by the ninth section of the Act of which this Act is amendatory.' 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and *Smith's patent was subject to that reservation.*

The 9th section of the Act of 1866 is referred to by Mr. Justice Field in *Atchison v. Peterson,* 87 U. S. 20 Wall. 507, 512 (22: 414, 416), and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

WHEN, HOWEVER, THE GOVERNMENT CEASES TO BE THE SOLE PROPRIETOR, THE RIGHT OF THE RIPARIAN OWNER ATTACHES, AND CANNOT BE SUBSEQUENTLY INVADED. As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriations of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

We come now to the Oregon case

Faull v. Cooke, 19 Or. 455-466, 26 Pac. 662. (July 1st, 1890).

Quotation from page 463:

"In *Larsen v. The O. R. & N. Co.,* decided at the present term, it was held, in effect, that a set-

tlement made by a homestead claimant upon the public lands of the United States and compliance with act of congress on the subject, segregated the same from the public lands and cut off intervening claims, and such is the ruling of the land department of the United States.

Since the announcement of the opinion in *Larsen v. The O. R. & N. Co., supra,* this case was argued, and *our attention has been called to the recent opinion of the Supreme Court of the United States in Steers v. Beck,* 10 Fed. R. 350.

The opinion of the court in that case is very exhaustive, and fully and conclusively settles the legal question under consideration adversely to the appellant. In that case the identical question, in principal, involved here was presented, and it was held that a *homestead claimant's riparian rights attached from the date of his settlement,* provided *he complied with the law* and obtained a patent for the land, and that when such patent was issued it related to the date of settlement *and cut off the right to divert a stream of water running through such homestead."*

In

Brown v. Baker, 39 Or., 66-75 (65 Pac. 799; 66 Pac. 193). Decided July 15. 1901.

Quotation from page 68-69:

"1. It is maintained by defendant's counsel that in order to secure priority in the appropriation of water, the stream or lake from which it is taken must be tapped at some point on the public domain, and that, the plaintiffs have alleged that they and their prantors diverted the water of Willow Creek at points on their own premises, shows that no such appropriation had been made, and hence the court erred in overruling the demurrer to the complaint, and in awarding to plaintiffs the use of any water from said stream. The water of a non-navigable stream is an incident to the soil through which it flows, and, as the United States is the primary pro-

prietor of public lands, its grant of the waters thereof, in the Pacific Coast states, to the person having the priority of its possession (14 Stat. U. S. 253, c. 262), in the absence of a constitutional provision or statute declaring water to be public property, necessarily cuts off the right of a subsequent settler to divert the water under a claim of prior apropriation. Title by relation gives to the first settler upon the public land the priority of possession of the water flowing through the same, (*Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; *Larsen v. Oregon Ry. & Nav. Co.*, 19 Or. 240, 23 Pac. 974; *Johnson v. Bridal Veil L. Co.*, 24 Or. 182, 33 Pac. 528; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568), though he may never appropriate the water to a beneficial use. If a lower riparian proprietor had acquired a right to the waters of Willow Creek prior to plaintiff's diversion, such right would necessarily defeat their appropriation of water, because the stream at the time of the diversion was not flowing through public lands. The right of prior appropriation is limited to the use of water by the pioneer settler BEFORE ANY ADVERSE CLAIMS OF RIPARIAN PROPRIETORS ATTACH TO THE STREAM FROM WHICH THE WATER IS TAKEN, and not to the points of diversion, which may be either within or beyond the boundaries of the tract selected by such settler."

BOTH BEFORE AND AFTER THE ADOPTION OF THE CODE, RIGHTS BY APPROPRIATION WERE HELD TO ONLY BE SUPERIOR TO THE RIPARIAN RIGHTS WHEN THE LATTER HAD BEEN DESTROYED BY ADVERSE USE OF THE WATER FOR THE PERIOD OF PRESCRIPTION.

One of the dissenting opinions in the Hood River case was that of Mr. Justice McCourt, which is at 114

Or. 213-248. This reference is not for the purpose of quoting a dissenting opinion.

In making this quotation we have inserted the dates of the decisions, respectively. They are cases decided at about the time of the enactment of the water code. All but two of the decisions were rendered prior to the code's adoption.

We quote from page 236:

> "To initiate title to the use of water by adverse user, as against a riparian owner, there must be a hostile invasion of the rights of the latter to use the water, asserted in such a way that the owner may know of the claim, and adverse title can only arise where such adverse use has been exclusive, continuous and uninterrupted under a claim of right for ten years: *Bowman v. Bowman,* 35 Or. 279, 283 (57 Pac. 546) (1889); *Carson v. Hayes,* 39 Or. 97 (65 Pac. 814) (1901); *Oregon Construction Co. v. Allen Ditch Co.,* 41 Or. 209, 216 (69 Pac. 455, 93 Am. St. Rep. 701) (1902); *Britt v. Reed,* 42 Or. 76, 83 (70 Pac. 1029, 1030) (1902); *Davis v. Chamberlain,* 51 Or. 304 (98 Pac. 154) (1908); *Ison v. Sturgill,* 57 Or. 109, 118 (109 Pac. 579, 110 Pac. 535) (1910); *Cantrall v. Sterling Min. Co.,* 61 Or. 516, 524 (122 Pac. 42) (1912)."

STATE ENGINEER'S PERMITS

Tobey v. Bridgewood, 127 Pac. 178-185 (Supreme Court of Idaho. Oct. 3, 1912):

Quotation from page 181:

> "The permit, therefore, is not an appropriation of the public waters of the state. It is not real property under the statutes. Rev. Codes. Sec. 3056; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.,* 5 Idaho, 793, 51 Pac. 990, 40 L. R. A., 485. A permit, however, is the consent given by the state

to construct and acquire real property. In order to acquire a permit, the statute provides that the person, association, or corporation, intending to acquire the right to the beneficial use of the waters of any natural stream,' etc. This doctrine is also announced in the case of *Nielson v. Parker,* 19 Idaho, 727, 115 Pac. 488."

And to the same effect is:

"Washington State Sugar Co. v. Goodrich, 147 Pac. 1073, 1076. (Supreme Court of Idaho, April 28, 1915):

in which such a water claim is held to be a "mere declaration of intention to create a water right which may never be anything more than an intention."

Basinger v. Taylor, 164 Pac. 522-528. (Supreme Court of Idaho, April 3, 1917).

Quotation from page 524:
(Italics ours).

"Without reference to the question of title, however, respondent Taylor could not rely upon permit No. 2929 in this case. The issue presented by his cross-complaint is ownership of a water right, and on this issue the holding of a permit from the state engineer, in and of itself, has *no probative force. A permit* from the state engineer is not a water right, and this court has *held that it is not an appropriation* of the public waters of the state and is not real property. *Speer v. Stephenson,* 16 Idaho, 707, p. 716, 102 Pac. 365; *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co.,* 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485."

The Idaho Supreme Court in

Marshall v. Niagara Springs Orchard Co., 125 Pac. Rep. 208-213. (Supreme Court of Idaho. June 8, 1912).

denied the right of an appropriator to enter upon pat-

ented land for the purposes of surveying, etc., without some right from the owner by agreement, condemnation or otherwise. (Quotation from p. 211).

> "In this instance, therefore, it appears clearly from the record that, in making the entry upon the lands of the appellant for the purpose of making the surveys and plans and maps upon which his application to appropriate the water was based, the respondent was a trespasser upon the lands of the appellant."

FOLLOWING THE CODE ADOPTION, WATER RIGHTS WERE DETERMINED IN THE OREGON COURT UNDER THE COMMON LAW RIPARIAN DOCTRINE, AND THE DOCTRINE OF APPROPRIATION, AS ABOVE STATED, WITHOUT CONSIDERATION OF THE CODE, UNTIL IN RE WILLOW CREEK, CITED BELOW.

We quote from:

> *In re Willow Creek*, 74 Or. 593-655, (144 Pac. 505, 146 Pac. 475), (1915), AN ADJUDICATION under the code.

Quotation from Oregon Report, pages 626-7:

> "22. In *Jones v. Conn*, 39 Or. 30 (64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630), it was held in a controversy between riparian proprietors upon a natural watercourse, that a riparian proprietor has a right to the use and enjoyment of the water that naturally flows past or through his land, subject to the right of other riparian owners to a reasonable use thereof for domestic, agricultural and manufacturing purposes, provided that the upper proprietor does

not appropriate enough to substantially injure the common right which each proprietor has. * * * *The doctrine of prior appropriation and riparian rights is not so antagonistic that they may not exist in the same locality.* A settler on a non-navigable stream has the election either to rely upon his rights as riparian proprietor or to make an appropriation of the water and claim as an appropriator, but he cannot do both: *Williams v. Altnow,* 51 Or. 277, 300 (95 Pac. 200, 97 Pac. 539); *Crawford v. Hathaway,* 60 Neb. 754 (84 N. W. 271); *Crawford v. Hathaway,* 61 Neb. 317 (85 N. W. 303); *Crawford v. Hathaway,* 67 Neb. 325 (93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889)."

Page 627:

"24. In the arid and semi-arid lands of the west the early home-builders first settled upon the streams and other bodies of water. The rights of such people to a reasonable use and benefit of the water flowing over their lands which they have appropriated or used for a beneficial purpose should be carefully considered and not abrogated. Those obtaining title to land take the same subject to the laws *then* prevailing and defining the appurtenances thereto. When *such rights have become vested,* they cannot be taken away by legislative enactment nor judicial decree. Like all property they are subject to reasonable regulation."

Page 624:

"By act of Congress, July 26, 1866, Chapter 262, 14 Stat. 253 Section 9, (§2339, R. S. U. S., 7 Fed. Stats. Ann. 1090, 1093, U. S. Comp. Stats. 1913, § 4647), whenever rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued *by priority of possession and are acknowledged by local customs, laws, and decisions of courts, the same are recognized and protected. This act established no new*

right. The practical construction of this statute has been that as long as the land belonged to the United States the water flowing over the same was subject to appropriation for any of the purposes named when such appropriation was recognized by the local customs, laws or decisions of the courts; but if the water was not so appropriated, it was not subject to appropriation after the land over which it flowed became private property: Davis v. Chamberlain, 51 Or. 304, 315 (98 Pac. 154); *Broder v. Water Co.* 101 U. S. 274, (25 L. Ed. 790); *Rio Grande Western R. R. Co. v. Telluride P. & T. Co.,* 16 Utah, 125, 137 (51 Pac. 146); *Benton v. Johncox,* 17 Wash. 277, 287 (49 Pac. 495, 61 Am. St. Rep. 912, 39 L. R. A. 107); *Sturr v. Beck,* 133 U. S. 541 (33 L. Ed. 761, 10 Sup. Ct. Rep. 350)."

The foregoing case, In re Willow Creek, had the careful consideration of this Court in,

Pacific Livestock Co. vs. Lewis, 241 U. S. 440, 60 Law Ed. 1084, Cited at 241 U. S. 448-9.

A consideration of that case was doubtless in part responsible for this Court's construction of Section 1 (Appendix 1), and Section 70 (Appendix 29, 30, 31). There this Court construed the language of those two sections, to the effect that the Water Code was not intended to take away or impair any vested rights of the riparian proprietor. (241 U. S. 445).

Without the construction in Re Willow Creek the Court would doubtless have so construed Section 1 and Section 70 of the Code as showing that it was not the intention of the Legislature in the enactment of the Code, to impair in any way such vested rights of

riparians. But with the construction in Re Hood River, it would seem that this Court must have held with the appellants in the Livestock case.

Numerous adjudications followed In Re Willow Creek. Most of these are not helpful on the matters involved here.

In *Re Sucker Creek,* 83 Ore. 228, (163 Pac. 430). (1917).

We quote from the opinion of Mr. Justice Harris at 233:

> "1. Quoting from her printed brief the appellant says that this appeal presents one question: 'Has Mrs. Leonard waived her riparian rights for the irrigation of her land?' Sucker Creek crosses both the Caldwell place and the Home place and all the lands of the two farms are riparian within the meaning of the precedents of this jurisdiction. It is now too late, however, to debate whether a riparian owner can divert and use water from a stream by virtue of a right acquired by prior appropriation and also assert a right to the surplus as a riparian owner. Repeated decisions have wedded this court to the doctrine that a settler upon a non-navigable stream has an election either to rely upon his rights as riparian proprietor or to make an appropriation of the water, if it is subject to appropriation, and claim as an appropriator, but he cannot do both. One can only be acquired by active and affirmative steps, while the other is incident to and, in the absence of a waiver or other loss of the right, accompanies the ownership of riparian lands. To use the water of a stream as a prior appropriator is to waive the right to use the water of that stream as a riparian owner: *Low v. Schaffer,* 24 Or. 239, 246 (33 Pac. 678); *North Powder Co. v. Coughanour,* 34 Or. 9, 22 (54 Pac. 223); *Brown v. Baker,* 39 Or. 66, 70 (65 Pac. 799, 66 Pac. 193);

Williams v. Altnow, 51 Or. 275, 300 (95 Pac. 200, 97 Pac. 539); *Davis v. Chamberlain,* 51 Or. 304, 310 (98 Pac. 154); *Andrews v. Donnelly,* 59 Or. 138, 144 (116 Pac. 569); *Bowen v. Spaulding,* 63 Or. 392, 395 (128 Pac. 37).

2, 3. The right of appropriation is incompatible with the rule of riparian proprietorship. The doctrine of appropriation excludes the idea of equality and makes each water right superior to all others subsequently intiated and completed and inferior to all that have been previously acquired, while the characterizing feature of riparian ownership when aplied to irrigation is equality or, perhaps to speak more exactly, the right of each person is correlated with the right of every other person, although a riparian owner may take all the water in the stream if needed to satisfy domestic wants."

The opinion continues with the statement that appropriations can be exercised by fixed rules, and the amount definitely determined. But that the exact amount to be used by a riparian proprietor cannot ordinarily be ascertained in advance because it must be exercised in subordination to the rights of the riparian proprietor. (page 235).

The decision then determined that Leonard had waived her right to claim as a riparian proprietor and elected to proceed and claim as an appropriator, by insisting upon a definite quantity of water, and insisting upon priorities of use. (pages 235-6).

The next Oregon decision in point of time of importance here is

Logan v. Spaulding Logging Co., 100 Ore. 731, 736, (190 Pac. 349). (1920). Rehearing denied Feb. 15th, 1921.

We quote from it in the body of the brief. It is to the effect that an Act impairing a riparian right violates the Oregon Constitution in taking property without compensation.

That decision was rendered in June, 1920; Rehearing denied February 15, 1921, prior to petitioner's purchase of its lands.

We make the following quotation from:

In Re Water Rights of Hood River, 114 Or. 112; (227 Pac. 1065) (1924).

Quotation from pages 181-182:

"It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor: *Kansas v. Colroado,* 206 U. S. 46, 94 (51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655, see also, Rose's U. S. Notes); *Sternberger v. Seaton,* 45 Colo. 401, 403 (102 Pac. 168); *Clark v. Nash,* 198 U. S. 361 (4 Ann. Cas. 1171, 1174, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676); *Atchison v. Peterson,* 87 U. S. 508 (22 L. ed. 414); *Boquillas L. & C. Co. v. Curtis,* 213 U. S. 339 (53 L. ed. 822, 29 Sup. Ct. Rep. 493); *Van Dyke v. Midnight Sun M. & D. Co.,* 177 Fed. 85 (100 C. C. A. 503); *United States v. Rio Grande Irr. Co.,* 174 U. S. 690, 703 (43 L. ed. 1136, 19 Sup. Ct. Rep. 770, see also, Rose's U. S. Notes).

The statute of this state plainly declares that all waters within the state from all sources of water supply belong to the public: Section 5715, Or. L. This is, of course, subject to the further provision of the act. As we have noted the courts of this state and other states and of the United States have upheld the legislative enactments of this state and other similar statutes. Rights to public waters can

be acquired as provided by the several statutes of this state: *Cookingham v. Lewis,* 58 Or. 484, 490 (114 Pac. 88, 115 Pac. 342); *Caviness v. La Grande Irr. Co., supra.*

Under our present statute defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained." (The reference to our present statute is a reference to the Water Code.)

The reference in the above quotation to O. L. 5715 refers to Oregon Laws 47-401, which reads:

"All Water within the state from all sources of water supply belongs to the public."

This Act is Chapter 221 of the Laws of 1909, passed at the same Session as the enactment of the Water Code. It was filed in the office of the Secretary of State February 24, 1909, but having no emergency clause it would not become operative for a period of three months from the adjournment of the Legislature. (Article IV, Section 28 Oregon Constitution.) The Session closed February 20, 1909.

So in point of enactment it is subsequent to the Water Code. Its title is:

"An Act Providing for Granting Franchises of Water Power by the State, and Collecting Fees Therefor."

Section 1. Provides as above stated.

Section 2. Requires all who appropriate water after the passage of the Act for the development of power, shall pay certain fees therein specified.

Section 3. Provides for the apportionment of fees paid.

Section 4. Provides that after the appropriation is complete he "shall own and enjoy all of the uses thereof as long as he pays the annual fees therefor," etc.

Section 4. Further provides that certain matters may be put up to the Board of Control (not material here).

Section 5. Provides that one aggrieved by the action of the Board may appeal to the Circuit Court for the county in which the proposed appropriation of water is situated.

Section 6. Provides that in case a Board should not be created by law, the duties imposed by the Act upon the Board shall devolve upon the State Engineer.

At the time when the Hood River case was pending before the Supreme Court of Oregon, there was also pending the case from which we quote known as the

NORWOOD CASE

Norwood v. Eastern Oregon Land Company, 112 Or. 106; (227 Pac. 1111), (1924).

Quotation from page 111 of the Oregon report

> "2. The riparian rights of the defendant company, as such, date back to the year 1867 *when it and its predecessors in title acquired the ownership of the land.*"

and from pages 113-4:

> "According to the record, all that the company has ever had or claimed to hold is a riparian right. Such a right is appurtenant to the land. In *Jones v. Conn,* 39 Or. 30, 34 (64 Pac. 855, 65 Pac. 1068,

87 Am. St. Rep. 634, 54 L. R. A. 630, 53 Cent. L. J. 128), Mr. Chief Justice Robert S. Bean used the following language: 'It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the Water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality.'

In *Brown v. Baker,* 39 Or. 66 (65 Pac. 799, 68 Pac. 193), Mr. Justice Moore said: 'The water of a non-navigable stream is an incident to the soil through which it flows.'

* * * Riparian rights are purely local, inseparably annexed to the lands washed by the stream at *the place where they border on its waters.* Such rights cannot be divorced from the adjacent lands."

and from page 116:

"We remember that, as determined by the decree of adjudication, the title to the defendant's land was acquired prior to the passage of the Desert Land Act of March 3, 1877, to which reference has been made. *The title of the defendant therefore carried with it the common-law riparian rights which have always been recognized in this state."*

The Court further, at page 117, said:

"The first section of that act says:

'Subject to existing rights, all water within the state may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water.'

Again, in Section 70 of that act it is said:

"Nothing in this act contained shall impair the vested right of any person, association or corporation to the use of water.'

The opening declaration of the act was that

waters within the state may be appropriated for beneficial use. *The title of the act,* so far as existing rights were concerned, *limits the operation of the statute to 'the determination of existing rights.' Thus controlled in the title of the act as well as by the terms thereof, the legislature could not and did not add to or subtract from the scope of then existing rights."*

We discuss the Norwood Case below, under the title of "The Harris Case."

Harris v. Southeast Portland Lumber Co., 123 Or. 549 (262 Pac. 243) (1927)

(THE HARRIS CASE)

The appellate court followed the Hood River Case in holding that petitioner's vested common law riparian right had been destroyed by Section 70 of the Water Code, but the Oregon Court has never been able, except in this one spasmodic decision by a divided court, to abandon the common law riparian right doctrine in lands that had been patented before the passage of the Water Code. The Norwood case (cited) was before the Oregon Court at the same time that it was considering the Hood River case.

The appellate court in the instant opinion stated that the Hood River and the Norwood cases were decided upon the same day. It seems to have a prior date, but following the opinion in the Norwood case there is, at 112 Oregon 119, an opinion by Mr. Justice Bean (called "Concurring in part, dissenting in part.") It was this Justice who wrote the prevailing opinion in the Hood River case, and in this concurring and dissenting opin-

ion in the Norwood case, page 119, is found this statement:

> "The question of riparian rights is fully discussed in the several opinions in *re Hood River*, 227 Pacific, 1065, and it is unnecessary to further comment thereon." (It will be noted in the citation below, that the Pacific reference to the Norwood case is 227 Pacific 1111).

These two cases were decided in 1924,—thirty-eight years after the decision in 1886 of *Weiss v. Oregon Iron and Steel Co.*, 13 Or. 508, quoted in the appendix here, at pages 52-56, and thirty-seven years after the issuance of petitioner's patent.

The majority opinion in the Norwood case held that, except for the construction of the Desert Land Act, the common law rights had always been recognized in Oregon. (From page 116 of 112 Oregon.)

The Harris case, cited below, was decided December 20, 1927, three years after the decisions of the Hood River case and the Norwood case. It went back to *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496, and reaffirmed the common law riparian doctrine as announced there, and also considered the effect of an adverse appropriation on riparian rights out of the stream from which the appropriation was made.

We quote:

> *Harris v. Southeast Portland Lumber Co.*, 123 Or. 549; (262 Pac. 243)

from 556-557 of the Oregon report:

> "In this country it is very generally held that a

title by prescription to a corporeal or incorporeal hereditament may be acquired by an uninterrupted enjoyment for the period limited by statute for the right of entry upon land, and that it is the policy of the law to limit the presumption of a grant to periods analogous to those of the statute of limitations in cases where such statutes do not directly apply, and that there is no difference in the doctrine whether the grant relates to corporeal or incorporeal hereditaments; Angell on Watercourses (7 Ed.), § § 204-209. In *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496 (11 Pac. 255), this court, speaking through Mr. Justice Lord, said:

'Riparian proprietors are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. * * The general principle is, that every owner of land thru which a natural stream of water flows has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription.'"

After making the foregoing quotation from the 13th Oregon, the opinion in the Harris case, continues:

"The rights claimed in this suit are purely riparian in their nature and, as such, each proprietor, in the absence of grant, license or prescription limiting his rights, may insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level, and this right is a right of property inseparably annexed to the soil itself and exists *jure naturae* as parcel of the land, which

right will not be suspended or destroyed by mere nonuser, although it may be extinguished by the long continued adverse enjoyment of others: Gould on Waters (3 Ed., Sec. 204). The evidence of a right by prescription 'ought always to be clear and conclusive.' *McRae v. Small*, 48 Ore., 139 (85 Pac. 503)."

ADDITIONAL AUTHORITIES UPON COMMON LAW RIPARIAN RIGHTS

U. S. v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, at 43 L. Ed. 1136, 1141; (1899).

quotation from 174 U. S. at 702:

"The unquestioned rule of the common law was that *every riparian owner* was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Sec. 439):

'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land *as an incident to the land* he cannot unreasonably detai nit, or give it *another direction* and he must return it to its ordinary channel when it leaves his state'."

Nebraska

Clark v. Cambridge & A. Irr. & Imp. Co., et al, N. W. Vol. 64, p. 239, 241. (Supreme Court of Nebraska, Sept. 18, 1895).

In the above case the Supreme Court of Nebraska was considering an irrigation statute modelled after that of California. Its decision quoted *Lux v. Haggin*, 69th Cal., 255, which held that the California irrigation statute, allowing the appropriation of water for irrigation purposes, could not be construed to apply to waters on riparian lands that were acquired *before* or since the adoption of the Code.

The Supreme Court of Nebraska said:

> *"It may be that our statute, unlike the Code of California, was intended to embrace all waters of the state,* since it is an historical fact, of which we take notice, that the public lands along the streams of this state had practically all been disposed of previous to 1889. But it is unnecessary to pursue the subject at this time, for assuming such to have been the intention of the legislature, it is a clear invasion of private rights, and within the prohibition of the constitution. The right of a riparian proprietor, as such, *is property and, when vested,* can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law. *Lux v. Haggin, supra; Yates v. Milwaukee,* 10 Wall. 479; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.,* 109 U. S. 672, 3 Sup. Ct. 445, and 4 Sup. Ct. 15; *Delaplaine v. Railway Co.,* 42 Wis. 214; *Bell v. Gough,* 23 N. J. Law, 624; *Water Co. v. Raff,* 36 N. J. Law, 335."

California Prior to its Constitutional Amendment of 1928

Fall River Valley Irr. Dist. v. Mt. Shasta Power Corporation, 259 Pac. 444, 448. (Supreme Court of California, Sept. 1, 1927).

"A re-examination of the nature of the riparian right in the light of the facts of this case leaves us entirely satisfied with our previous pronounce-

ments upon this subject. We therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse—a right (qualified only by the correlative rights of other riparian proprietors) to use the entire ordinary and natural flow of the stream for all lawful riparian uses and also to have all such flow come down to the land undiminished other than by the lawful uses by upper riparian proprietors or by the rights of those who have otherwise obtained a superior claim to the use of a portion of the stream. This right to use the water of the stream we hold to be entitled to the same respect and protection at the hands of the *law as any other vested property right.*"

R. C. L. Vol. 27—Waters, (page 1071)

"12. Riparian Rights as Property — Riparian rights are an incident to the ownership of the land adjacent to the water, and may be lost by grant, condemnation, or prescription. They cannot be taken by the state even for a public use without compensation to the owner, and cannot be taken at all or impaired for a private use. They constitute property that may be the subject of bargain and sale and are a part of the owner's estate in the land, and materially enter into the actual value. They exist with such ownership, and pass with the transfer of the land without any designation in the conveyance."

South Dakota

St. Germain Irrigating Co. v. Hawthorn Ditch Co., 143 N. W., 124-128. (Supreme Court of South Dakota. Sept. 23, 1913).

Quotation from page 126:

"(2) 'Every person, through whose land a natural water-course runs, has a right, *publica juris*, to the benefit of it for all useful purposes to which

it may be applied, and no proprietor of land, on the same water-course, either below or above has a right to unreasonably divert it from flowing upon and onto his premises or to obstruct it in passing from them or to corrupt or destroy it. This riparian right is inseparably annexed to the soil, not as an easement nor as an appurtenance, but as a part and parcel of the land itself. Use does not create it, and disuse cannot destroy or suspend it.' *Johnson v. Jordan,* 2 Metc. (Mass.) 239, 37 Am. Dec. 85; *St. Helena Water Co. v. Forbes,* 62 Cal. 182, 45 Am. Rep. 659; *Shamleffer v. Council Mill Co.,* 18 Kan. 24; *Rigney v. Tacoma L. & W. Co.,* 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Lux v. Haggin,* 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *Schriver v. Smith,* 100 N. Y. 471, 3 N. E. 675, 53 Am. Rep. 224; *Whitney v. Wheeler Mill Co.,* 151 Mass. 396, 24 N. E. 774, 7 L. R. A. 613; *Duckworth v. Water Co.,* 150 Cal. 520, 89 Pac. 338; *Turner v. James Canal Co.,* 155 Cal. 82, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, and note; *Redwater Canal Co. v. Jones,* 27 S. D. 194, 130 N. W. 85; *Redwater Canal Co. v. Reed,* 26 S. D. 466, 128 N. W. 703; *Lone Tree Ditch Co v. Cyclone Ditch Co.* 15 S. D. 519, 91 N. W. 352; *Stenger v. Tharp,* 17 S. D. 13, 94 N. W. 402. The right of a riparian owner to make a reasonable beneficial use of the waters of a flowing stream for domestic and irrigation purposes is a *vested property right* and is entitled to protection to the same extent as property rights generally. It is *within the purview of a constitutional provision prohibiting the taking of property for public use without compensation. McCook Irrigation Co. v. Crews,* 70 Neb. 109, 96 N. W. 996; *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. Vested property rights in waters in this state, whether held as riparian or by prior appropriation, could not thus be taken or confiscated or interfered with by any such act of the Legislature."

Kinney on Irrigation and Water Rights

Kinney, (2nd Ed.) Vol. II, Sec. 817:

Quotation beginning on page 1432:

"§ 817. Appropriations and Riparian Rights—Effect of Desert Land Act of 1877.—Section 1 of the Desert Land Act of March 3, 1877, among other things, provided: 'And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.' It is viewed by some authorities that this provision abolished even 'the so-called modified doctrine of riparian rights,' as to all lands through which non-navigable streams flow, the title to which has been acquired from the Government of the United States since the passage of that act, even in those Western States which had theretofore adhered to this common-law rule as one of their dual systems of laws governing the use of the waters flowing within their respective boundaries; and, that thereafter all waters flowing within the boundaries even of these States were subject to the law of appropriation only. We do not believe that this is the correct construction to give to the provisions quoted in the Act of 1877. The trouble seems to be in confusing the rights of the United States as the proprietor and as sovereign. To be sure, the United States was primarily the owner and proprietor of both the public lands and the waters flowing over them. The Government is still the owner and proprietor of all the surplus waters flowing over its lands, to which vested rights have not attached. But the United States has not the soverign control over waters which flow within the boundaries of a certain State, except so far as it has reserved the waters of the natural streams for the general use of the public for navigation, and for its own uses as a

riparian owner or otherwise upon the Government reservations and lands used by the Government itself for some purpose. We do not believe that Congress has the power to abolish the law of riparian rights either in the Western or Eastern States, where a State by its laws has declared that, governing the subject of waters, the common law shall be followed. The sovereignty, jurisdiction, and control over all waters flowing within the boundaries of a State are left, with the exceptions above mentioned, to the laws of that State upon its admission to the Union. That State may adopt the common-law as it is strictly construed in England and in the Eastern States of this country; it may adopt the modified form of that law as has been done to meet the peculiar conditions in the Western States; or, upon the other hand, it may entirely abolish the common law upon the subject of waters and adopt in lieu thereof the Arid Region Doctrine of appropriation only; or again, it may adopt both the common law and the doctrine of appropriation. But, as far as Congress is concerned, it can not force any particular law governing waters upon any State. As was said by Mr. Justice Brewer in the case of *Kansas v. Colorado,* 'It may determine for itself whether the common law rule in respect to riparian rights, or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation, shall control. Congress can not enforce either rule upon any State.' Hence it must follow that the Desert Land Act of 1877 did not, nor could it, abolish the common law of riparian rights in a State where that law had been adopted as at least one of the rules of law governing waters within its boundaries. The only effect that that Act had, or could have had, in regard to the subject under consideration, was to emphasize the right already granted under the Act of 1866 and as amended in 1870, to the effect that the surplus waters of the natural streams, or other sources of water supply, flowing over the public

lands might be taken under the doctrine of appropriation, as far as the rights of the Government as the owner thereof were concerned, for irrigation or other beneficial purposes."

VESTED RIGHTS DEFINED

A vested right is an immediate fixed right of present or future enjoyment. It is defined by the Supreme Court as follows:

Pearsall v. Great Northern R. Co., 161 U. S. 646-677; 16 Sup. Ct. 705; 40 L. Ed. 838.

(The quotation therefor being taken from 161 U. S. 673).

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an *immediate fixed right of present or future enjoyment;*' and by Chancellor Kent as an 'immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent, Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Cooley, Const. L. 332."

Please also see the following references:

Crump v. Guyer et al, 157 Pac. 321, 322; (Supreme Court of Oklahoma. Feb. 29, 1916).

"'Rights are "vested" when the right of enjoyment, present of prospective, has become the

property of some particular person or persons as a present interest. *Trustees of Presbytery of Jersey City v. Trustees of First Presbyterian Church of Weehawken,* 80 N. J. Law, 572, 78 Atl. 207, 210.'

Again:

'A "vested right" may be considered as the power to do certain actions or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is protected by those provisions in the Constitution which apply to such rights.'

In

Gladney v. Synor, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517,

the court says:

'Vested rights may be created either by the common-law, by statute, or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection.' "

The decision then quotes Judge Story as follows:

" 'Judge Story in

Society v. Wheeler, 2 Gall. 105, Fed. Cas. No. 13, 156 says:

' * * * Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions of considerations already past, must be deemed retrospective;' * * *

We think the doctrine announced by Judge Story in *Society v. Wheeler, supra,* is sound, which is to the effect that upon principle every statute which takes away or impairs 'vested rights' acquired under existing laws, imposes a new duty, or attaches a new disability, must be deemed retrospective. * * * *

Not Lost by Nonuser.

'A failure to exercise a vested right before the passage of a subsequent statute which seeks to divest it in no wise affects or lessens that right.' *Trustees of Presbytery of Jersey City v. Trustees of First Presbyterian Church,* 80 N. J. Law, 572, 78 Atl. 207; *Graham v. Great Falls Water Power & Townsite Co.,* 30 Mont. 393, 76 Pac. 808; *Evans-Snider-Buel Co. v. McFadden,* 105 Fed. 293, 44 C. C. A. 494, 58, L. R. A. 900; *Downs v. Blount,* 170 Fed. 15, 95 C. C. A. 289, 31 L. R. A. (N.S.) 1076; *National Bank of Commerce v. Jones,* 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N.S.) 310, 11 Ann. Cas. 1041; *Lohrstorfer v. Lohrstorfer,* 140 Mich. 551, 104 N. W. 142, 70 L. R. A. 621; *Marshall et al v. M. E. and S. V. King et al.,* 24 Miss. 85."

We quote from Ruling Case Law, Volume 6, Sections 294, and 295 (page 308):

"294. Definition of Vested Rights.—The words 'vested rights' appear first to have been used in reference to real estate. This term is defined as 'an immediate fixed right of present or future enjoyment' and 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' Rights are said to be vested in contra-distinction to their being contingent or expectant. A right is 'vested' when there is an ascertained person with a present right to present or future enjoyment; it is 'expectant' when it depends on the continuation of existing circumstances, such as the right of an heir to inherit, provided he survives his ancestor and the ancestor dies siezed and intestate; and finally a right is 'contingent' when it depends on the performance of some condition or the happening of some event before some other event or condition happens or is performed. As applied to the vested rights which are secured by constitutional guarantees from infringement or impairment except under special circumstances, the term

is not to be restricted to any narrow or technical meaning applicable to these words in the law of real property. The words are used as implying interests which it is proper for the state to recognize and protect, and of which the individual could not be deprived arbitrarily without injustice.

295. Nature and Origin of Vested Rights.—Vested rights may be created either by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection. The *failure to exercise a vested right before the enactment of a subsequent statute which seeks to divest it in no way affects or lessens such right.* The vested right may arise in many different ways. For example, it may be one which has arisen by dedication, or by escheat, or it may be one in the nature of a mere easement."

LEGISLATIVE ACTS IMPAIRING VESTED RIGHTS—CONSTRUED AS PROSPECTIVE LAWS, NOT RETROACTIVE LAWS.

Sturges vs. Carter, 114 U. S., 511-523 (May, 1885), 5 Sup. Ct. 1014, 29 Law Ed. 240-244; Quotation from 114 U. S. at page 519.

"In the case of *The Society for Propogating the Gospel v. Wheeler,* 2 Gall. 139, Mr. Justice Story thus defines a retroactive, or, as he calls it, a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, *must be deemed retrospective*'."

See also

Hoyt Metal Co. v. Atwood, 289 Fed. 453, 454-455 (Ill.) (February, 1923):

"(1) That an accrued right of action is a vested property right is well settled. *Norris v. Tripp,* 111

Iowa, 115, 82 N. W. 610; *Tufts v. Tufts,* 8 Utah, 142, 30 Pac. 309, 16 L. R. A. 482; *Pinkum v. City of Eau Claire,* 81 Wis. 301, 51 N. W. 550. Certainly a judgment is a vested property right. In 6 R. C. L., p. 319, we find the rule set forth correctly, we think:

> 'A judgment is such a vested right of property that the Legislature cannot by a retroactive law either destroy or diminish its value in any respect.' *Merchants' Bank v. Ballou,* 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; *Strafford v. Sharon,* 61 Vt. 126, 17 Atl. 793, 18 Atl. 308, 4 L. R. A. 499; *Roche v. Waters,* 72 Md. 264, 19 Atl. 535, 72 L. R. A. 533.

(2) By a long line of decisions, courts have uniformly held that a statute is presumed to operate *prospectively* only, unless an intent to the contrary clearly appears, and this is especially applicable where the statute, if given a retroactive operation, would be invalid as impairing the obligation of contracts, or *interfering with vested rights.* Sutherland, Statutory Construction, Secs. 463, 464; *U. S. v. Jackson,* 143 Fed. 783, 75 C. C. A. 41; *Bauer Grocer Co. v. Zelle,* 172 Ill. 407, 50 N. E. 237; *Southwestern Coal Co. v. McBride,* 185 U. S. 499, 22 Sup. Ct. 763, 46 L. Ed. 1010; *U. S. v. United Shoe Machinery Co.* (D. C.) 264 Fed. 138."

See also

Favot vs. Kingsbury, (Cal.) 276 Pac. 1083, 1086, (April, 1929):

" The state has no power to divest or to impair vested rights whether such attempt be made by legislative enactment, by municipal ordinance, or by change in the Constitution of the state. 12 C. J. p. 956; *Estate of Wellings,* 1 Cal. 189, 240 P. 21; *Richmond Wharf & Dock Co. v. Blake,* 39 Cal. App. 1, 177 P. 508; *James vs. Oakland Traction Co.,* 10 Cal. App. 785, 103 P. 1082; 6 English and American Ency. p. 955."

See also

Travelers' Ins. Co. v. Ohler, (Neb.) 227 N. W. 449, 450. (November, 1929); From N. W. 450: "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate *retrospectively* where it will have the effect to invalidate or impair the obligation of contracts or *interfere with vested rights.* 2 Lewis' Sutherland, Statutory Construction (2d Ed.) Sec. 642; *United States v. Jackson* (C. C. A.) 143 Fed. 783; *Hoyt Metal Co. vs. Atwood,* (C. C. A.) 289 F. 453; *Spitzer v. Healy,* 218 N. Y. 737, 113 N. E. 490."

Board of Sup'rs. of Arenac County v. Board of Sup'rs. of Iosco County, 122 N. W. 629-631. (Supreme Court of Michigan, Oct. 4, 1909).

Quotation from page 631:

"Those rights vested under Comp. Laws, Sec. 4424, and were not lost by the amendment of 1903, which should be held to be limited to cases arising thereafter.

(1) Under the rule that statutes will not be considered retroactive unless the intent that they should have retroactive effect clearly appears. *Price v. Hopkin,* 13 Mich. 318; *Smith v. Humphrey,* 20 Mich. 308; *Fuller v. Grand Rap.,* 40 Mich. 395; *Maxwell v. Bay City R. Co.,* 46 Mich. 278, 9 N. W. 410; *Phillips v. Buffalo Tp.,* 68 Mich. 217, 35 N. W. 918; *in re Lambrecht,* 137 Mich. 450, 100 N. W. 606; *Davis v. M. C. R. R. Co.,* 147 Mich. 479, 111 N. W. 76.

(2) It cannot be construed as retroactive to the detriment of vested rights. *Prane v. Reeder,* 21 Mich. 24, 4 Am. Rep. 430; *Van Fleet v. Van Fleet,* 49 Mich. 610, 14 N. W. 566; *Todd v. Elec. Com'rs.,* 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330; Cooley Con. Lim. (6th Ed.) p. 370; *Ludwig v. Stewart,* 32 Mich. 668; *Harrison v. Metz,* 17 Mich. 377; *McKisson v. Davenport,* 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507; *Atherton v. Bancroft,* 114 Mich. 241, 72 N. W. 208;

Angell v. W. Bay City, 117 Mich. 688, 76 N. W. 128; *Broffee v. Gd. Rap.,* 127 Mich. 92, 86 N. W. 401; *Heineman v. Schloss,* 83 Mich. 153, 47 N. W. 107; *Stitt v. Casterline,* 89 Mich. 239, 50 N. W. 847; *Finn v. Haynes,* 37 Mich. 63; *Danville Co. v. Ct. J.* 88 Mich. 244, 50 N. W. 40; *Philip v. Heraty,* 147 Mich. 473, 111 N. W. 93, 118 Am. St. Rep. 554; *Little v. Brousfield Co.,* 154 Mich. 369, 117 N. W. 963; Endlich on Statutes, Sec. 271; Potter's Dwarris on Stat. p. 163; *Boughner v. Bay City* (Mich.) 120 N. W. 597."

Crawford Co. v. Hathaway et al, 93 N. W., page 781. (Supreme Court of Nebraska. February 4, 1903).

Quotation from page 792:

"The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future." * * * *

"The substitution of the law of prior appropriation, instead of the common-law rule of riparian ownership, is applicable only to those waters in the state which are unappropriated; or, in other words, *which have not become the property of riparian proprietors.*"

L. D. Lowe and Wife v. James Harris, L. R. A., Vol. 22, 379-390. (North Carolina Supreme Court. May 5, 1893).

Quotation from page 381:

"The legislature unquestionably had and has the power to modify or repeal the whole of the statute of frauds in so far as it applies to future contracts for the sale of land, but its authority to give the repealing statute a retroactive operation is as certainly restricted by the fundamental rule

that no law will be allowed to so operate as to disturb or destroy rights already vested. Did the legislature intend that the Act of 1891 (chap. 465) should be construed to operate retrospectively, and, if so, is the law, in so far as it relates to pre-existing rights, unconstitutional? *No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in any state of the Union. Cooley,* Const. Lim. 165; *Wilkinson v. Leland,* 27 U. S. 2 Pet. 658, 7 L. Ed. 553; *Satterlee v. Matthewson,* 27 U. S. 2 Pet. 380, 7 L. Ed. 458; *Hoke v. Henderson,* 15 N. C. 4, 25 Am. Dec. 677; *Wales v. Stetson,* 2 Mass. 143, 3 Am. Dec. 39; *Calder v. Bull,* 3 U. S. 3 Dall. 394, 1 L. Ed. 651; *Dash v. Van Kleeck,* 7 Johns. 507, 5 Am. Dec. 291; U. S. Const. art. 1, sec. 10; N. C. Const. art. 1, sec. 17; *Butler v. Pennsylvania,* 51 U. S. 10 How. 416, 13 L. Ed. 478; *Fletcher v. Peck,* 10 U. S. 6 Cranch, 137, 3 L. Ed. 178; *Stanmire v. Taylor,* 48 N. C. 207, 214; *King v. Hunter,* 65 N. C. 603, 6 Am. Rep. 754; *Wesson v. Johnson,* 66 N. C. 189; 1 Kent. Com. 455; *Stanmire v. Powell,* 35 N. C. 312.

Even in England, where there are no written constitutions, a statute will not commonly be construed to divest vested rights, and, when giving it a retrospective effect may lead to that result, *it is allowed to operate prospectively only. Moore v. Phillips* 7 Mees. & W. 536; *Couch v. Jeffries,* 4 Burr. 2462."

R. C. L., volume 6 at page 305, section 291, states:

"If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, *but by reason of its repugnancy to constitutional provisions guaranteeing due process of law,* or for some other constitutional reason, as

for example, where it amounts to an improper assumption of judicial power by the legislature."

We quote the author further under section 293 (p. 307):

"Nevertheless statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles, and consequently inoperative and void. Irrespective of any express prohibition as to the enactment of retrospective laws, and, in consequence, laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy vested property rights; and that even if a law is intended simply to change the remedy or procedure it is void if in fact it impairs vested rights."

WE BELIEVE IT TO BE THE DOCTRINE OF THIS COURT THAT A RIPARIAN RIGHT IS DETERMINED BY THE LAW AS IT WAS AT THE DATE OF THE ISSUANCE OF THE PATENT; THAT WHEN ONCE VESTED, THE OWNER CAN ONLY BE DEPRIVED THEREOF IN ACCORDANCE WITH ESTABLISHED LAW; THAT IF NECESSARY, IT CAN ONLY BE TAKEN FOR PUBLIC GOOD UPON DUE COMPENSATION.

Brewer-Elliott Oil & Gas Co. v. United States, 270 Fed. 100-110, (affirmed by this court, 260 U. S. 77-89, 43 Sup. Ct. 60, 67 L. Ed. 140-147). We quote first from 270 Fed. at 109.

"(5) It has never held its public lands in the territories under unnavigable waters under any such trust, but it has always had and exercised the absolute right to grant and dispose of such lands absolutely as appurtenant to and parts of the

property granted or conveyed by it to the riparian owners of the banks adjacent thereto *according to the existing law upon the subject of the rights of riparian owners at the times of the respective grants.* Such riparian grantees and owners under the acts of Congress and under the law applicable in 1838, 1872, and 1883 at the place where these leased premises lie became the owners of the beds of unnavigable streams to the respective threads thereof. R. S. Sec. 2476 (U. S. Comp. Stat. Sec. 4918); *Railroad Co. v. Schurmeier,* 7 Wall. 272, 287, 19 L. Ed. 74. Such a riparian right of the owner of the bank to the bed of the stream was a valuable one of which *'when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.' Yates v. Milwaukee,* 77 U. S. (10 Wall.) 497, 504."

This decision is to the effect that these rights are according to those existing *at the time of the grant from the government.*

This case was appealed to this court and is to be found in 260 U. S. 77-89, 43 Sup. Ct. 60, 67 Law Ed. 140-147, and we quote from 260 U. S. 88, 89.

"It is not for a state, by courts or legislature, in dealing with the general subject of beds of streams, to adopt a *retroactive* rule for determining navigability which would destroy a title already accrued under Federal law and grant, or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the Public Land Laws may be determined according to local rules; but this is subject to the qualification that the local

rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. Thus, the right of the riparian owner under such grant may be limited by the law of the state either to high or low-water mark, or extended to the middle of the stream. *Packer v. Bird,* 137 U. S. 661, 669, 34 L. Ed. 819, 820, 11 Sup. Ct. Rep. 210.

We said in *Oklahoma v. Texas,* decided May 1, 1922 (258 U. S. 574, 66 L. Ed. 771, 42 Sup. Ct. Rep. 406):

> 'Where the United States owns the bed of a non-navigable stream, and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If, by a treaty or statute or the terms of its patent, it has shown that it intended to resrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. When it is disposing of tribal land of the Indians under its guardianship, the same rule applies.'

(89) In government patents containing no words showing purpose to define riparian rights, the intention to abide the state law is inferred. Mr. Justice Bradley, speaking for the court in *Hardin v. Jordan,* 140 U. S. 371, 384, 35 L. Ed. 428, 434, 11 Sup. Ct. Rep. 808, said:

> 'In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the *law of the state in which the lands lie*'."

RIPARIAN RIGHT IS A VESTED RIGHT WHICH CANNOT BE TAKEN EXCEPT UPON COMPENSATION PAID.

Thiesen v. Gulf, F. & A. R. Co., L. R. A. 1918 E., 718-738 (Fla.) (Decided November 3, 1917).

Quotation from page 738:

"Mr. Justice Miller in *Yates v. Milwaukee*, speaking for the Supreme Court of the United States, said: 'This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, *when once vested*, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation.'

See, also, *Potomac S. B. Co. v. Upper Potomac S. B. Co.*, 109 U. S. 672, 27 L. Ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; *Bell v. Gough*, 23 N. J. L. 624; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; Gould, Waters, Sec. 246.

Riparian rights, we think, are property and, being so, the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal if not sole inducement leading to the purchase by one, and the reason for the price charged by the seller."

Crawford Company v. Leroy Hall, et al., 60 L. R. A. 889-910. (Neb. Supreme Court, Feb. 4, 1903).

Quotation from page 898:

"The riparian proprietor, say all the books and authorities, has a right to the flow of the water of the natural stream passing through or by his land; such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass, or trees springing from the earth. Gould, Waters, Sec. 204, and authorities there cited. The riparian right to the use of the water flowing in a natural water course is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally. *Gould v. Boston Duck Co.*, 13 Gray 442; *Ashley v. Pease*, 18 Pick 268; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Keeney & W. Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 582; *Beissell v. Sholl*, 4 Dall. 211, 1 L. Ed. 804. * * * *

It is also urged that, by virtue of the legislation enacted, the common-law rights belonging to riparian proprietors have been abolished. This position cannot be, we think, successfully maintained. The legislature has not, as we construe the several acts of that body relating to the subject, attempted to abolish the common-law rule defining existing rights of riparian proprietors, or to deprive them of such rights when once vested. On the contrary, such rights have been distinctly recognized. Nor is it believed that *an attempt to abrogate such rights could be construed as other than an unconstitutional exercise of legislative power, and therefore invalid.*"

Mansfield vs. Balliett, L. R. A. Book 58, 1903, 628-637. (Ohio Supreme Court, January 21, 1902).

Quotation from page 633:

"Authors who have fully investigated the subject are quite agreed in their conclusions that riparian rights are property rights, and therefore property, in the legal signification of the term, and within the meaning of the Constitution. In 1 Lewis, Em. Dom. Sec. 60, that author says that 'all the authorities agree' that small streams incapable of navigation 'are wholly private property, and that the title of the riparian owner extends to the middle of the stream.' And in Sec. 61 it is said that 'it may be laid down as a well-settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in the quantity, quality, and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land. *This right is a part of his property in the land, and* in many cases constitutes its most valuable element. *It necessarily follows, therefore, that any violation of this right* in the exercise of the power of eminent domain *is a taking of private property* for which compensation must be made'."

Martha Lake Water Co., No. 1 v. Nelson et al., 277 Pac., 382. (Supreme Court of Washington, May 2, 1929):

"The constitution of this state (section 16 of article 1) provides that: 'No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.' * * *

In the present case the lowering of the waters of Martha Lake would materially and substantially damage the riparian owners. The water's edge would recede and land which was covered with water at the time of their purchase would become dry land. Under the constitutional provision cited, before their land can be thus damaged they are entitled to compensation."

Lux vs. Haggin, 69 Cal. 255, 10 Pac. 674. (Apr. 26th, 1886).

We quote from the Pacific, Volume 10, pages 753-4. For the sake of brevity we only make the following excerpts:

"But the right to a water-course begins *ex jure naturae,* and, having taken a certain course naturally, it cannot be diverted to the deprivation of the rights of the riparian owners below. So say all the common-law text-books, and the decisions. * * * *

The right to the flow of the water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel. Use does not create, and disuse cannot destroy or suspend it. Each person through whose land a water-course flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same water-course has a right unreasonably to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it. Chief Justice Shaw in *Johnson v. Jordan,* 2 Metc. 239. The right to the use of water flowing over land is undoubtedly identified with the realty, and is a real and corporeal hereditament. *Cary v. Daniels,* 5 Metc. 238. Prima facie every proprietor on each bank of a river is entitled to the land covered by the water to the middle thread of the river, and has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. Priority of occupancy of the flowing waters of a river creates no right, unless the apporpriation be for a period which the law deems a presumption of right." * *

"It has always been held that a grant of land carries with it the water flowing over the soil." * *

"By settled principles of both the civil and common law, the riparian owner has a usufruct in the stream as it passes over his land, of which he cannot be deprived by mere diversion. *Pope v. Kin-*

man, 54 Cal. 3. The right of a riparian proprietor to have the water of a stream run through his land *IS A VESTED RIGHT* and an interference with it imports damages."

We quote from

Wiel, Water Rights in the Western States, 2nd Edition, Section 56, page 115,

which cites the Lux case:

"§ 56. Prior Settlers Who Hold the Land In Fee.—All land that has passed into private ownership in fee simple is fully within this rule, and protected in its riparian rights against subsequent appropriators, though the appropriator goes on vacant public land to make his appropriation. (Citing Lux vs. Haggin). Usually the land passes into private ownership by virtue of a patent under the homestead, pre-emption, or other Federal laws. But the fee may have been acquired by virtue of a Mexican grant, made before the United States acquired sovereignty; and riparian rights (in jurisdictions recognizing riparian rights) fully attach to the land whose title is deraigned under a Mexican grant. Of course, the California rule does not apply in jurisdictions where riparian rights are rejected in toto."

THE NATURE OF AN APPROPRIATION. IT TAKES NOTHING AWAY FROM ANYONE. IT APPROPRIATES WHAT MAY BE TAKEN LEGALLY.

Rindge v. Crags Land Co., et al, 205 Pac. 36-39, (District Court of Appeal, California, Jan. 24, 1922).

Quotation from page 38-39:

"(4-8). It is established in California that a person may be possessed of rights as to the use of

the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator. *An appropriator can gain nothing as against riparian rights which have attached,* and, once such rights have become affixed, they continue and are not lost, regardless of whether the water has been put to any beneficial use upon the land; the right is one continually and perpetually appurtenant." * * * *

"'*An appropriation does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership, either by virtue of some riparian right or because of prior statutory or common-law appropriation and use.* It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in a stream, unless it has been continued adversely thereto for the period of five years under such circumstances as to gain a title by prescription, and then, only to the extent of the use.' *Duckworth v. Watsonville, etc.,* 150 Cal. 520, 89 Pac. 338."

THE ADJUDICATION OF THE WATERS OF ROGUE RIVER UNDER THE 1909 CODE NOT BINDING UPON PETITIONER.

The decree therein is Defendant's (Petitioner's) Exhibit "O," a printed pamphlet, containing a certified copy of that decree.

The owner of petitioner's lands was not served with process in that case. And under the Water Code, as construed In Re Willow Creek, 47 Ore., at 617-8 (cited

in the main brief), the decree is binding upon only those who were served according to statute. Any claimant who fails to submit his proof is barred by statute, but only if he has been served with process.

The decree was not pled nor offered as an estoppel. (Answer R. 20-38). There was a reference to the decree at R. 33, paragraph XI of the Answer, which alleges that the McClure 75 second foot right was adjudicated in that decree; and at R. 34, in the same paragraph, it is stated that the 220 second-feet adjudicated to the Oregon Water and Power Company by its said adjudication was conveyed to the City. But the ownership of these two rights by the respondents is conceded, as they were both initiated prior to the patenting of petitioner's land.

We quote from Defendant's (Respondent's) Exhibit "O," the so-called Adjudication Decree, paragraph IV thereof, at page 295-6 of the Record.

> "That the following named person, firms, associations, and corporations, *although duly and regularly notified as required by law of the commencement of these proceedings and although afforded opportunity to present their respective claims,* and to be heard herein, have failed and neglected to appear in these proceedings, or to submit or offer any proof herein of any right, title, interest, or claim thereto, in or to the use of, or the waters, or flow of the waters of said Rogue River or any tributary thereof involved in these proceedings; that the said persons, firms and corporations hereinafter named being in default herein, as more fully appears from the findings of fact of the State Water Board

herein, are hereby declared to be in default, and are *not entitled to any right, title, or interest* in or to the waters involved in these proceedings, nor any part thereof, *nor to any riparian rights,* rights by appropriation or prescription, or otherwise in respect to the diversion or use of said waters or any thereof, or to appear herein and subsequenly hereto assert any right, claim to, or interest in, said waters, or any of them, acquired, initiated or owned by them at or prior to the time of the commencement of these proceedings; and each of said persons, firms and corporations shall be, and hereby is, forever barred and estopped from hereafter asserting any rights heretofore acquired upon said Rogue River or any of its tributaries embraced within these proceedings, and shall be held, and hereby is declared, to have forfeited all rights to use of the waters herein involved, if any he had prior hereto, theretofore claimed by him; the persons, firms and corporations so being in default herein being as follows, to-wit:" (Following the words "to-wit:" is a long list of names of persons, companies and corporations, alphabetically arranged. The names of the following companies or corporations do not appear in the said list of *parties served and against whom default was entered as stated in said paragraph IV*):

Prospect Construction Company.
Rogue River Electric Company.
Siskiyou Light and Power Company.
Condor Water and Power Company.
California-Oregon Power Company.
The California Oregon Power Company,
plaintiff."

We call the court's attention to the statement at the foot of the language quoted from the Decree to the effect that following the end of the paragraph is the agreed statement in the record to the effect that there

follows a long list of persons, firms and corporations alphabetically arranged, and that the names of the following companies, etc., "do not appear in said list of parties served and against whom default was entered as stated in paragraph IV." (of Ex. "O"). Then follows a list of six companies mentioned which are all that have been listed in the testimony as predecessors in interest of the appellant, either in the utility business, or in the ownership of its property involved here.

The decree was not pleaded as an estoppel, nor otherwise.

THE DECREE, ACCORDING TO THE EVIDENCE, WOULD AT PETITIONER'S LOT 2 AND AT THE SOUTHERN PORTION OF PETITIONER'S LOT 1, MOVE THE THREAD OF THE STREAM WESTWARD FROM 100 TO 150 FEET (RECORD QUOTED AT PAGE 136 OF THIS APPENDIX).

Authorities cited below show that this sudden change will result in our boundary remaining where it was prior to the change in the river bed, because the thread of the river will change suddenly. The majority opinion herein was to the effect that this was no violation of petitioner's rights.

OREGON AUTHORITY ON BOUNDARY

We quote from the Supreme Court of Oregon in *Miscelli v. Andrus*, 61 Or. 78, 85, (120 Pac. 737), (1912).

"The United States originally owned the bed of each unnavigable river, and when any land bordering thereon is granted by the general government or its successors in title, by describing a border line as running to a bank of the stream and thence with its meanders, giving them, the *boundary* of the premises conveyed, unless restricted by express words, extends by the overwhelming preponderance of judicial utterance to the center of the river. 4 Am. & Eng. Ency. Law (2 ed.) 828; *Angell, Water Courses* (6 ed.) Sec. 29, note 1; 5 Cyc. 897; 2 *Farnham, Waters and Water Rights,* p. 1154; *Goff v. Cougle,* 118 Mich. 307 (76 N. W. 489; 42 L. R. A. 161) and notes. * *

Page 86:

A text-writer, in discussing the location of borders of land, says: 'If an unnavigable stream, in which the title of the riparian owner extends *ad filum aquae,* slowly and imperceptibly changes its course, the boundary line is the center of the new channel.' *Gould, Waters* (3 ed.) Sec. 159. This rule was followed in *Nebraska v. Iowa,* 143 U. S. 359 (12 Sup. Ct. 396; 36 L. Ed. 186), where the new channel instead of the middle of the stream was adopted as the limit of ownership."

However, such decisions do not change the facts. The stream and the bed thereof continue to remain alike the property of both, and although the actual ownership, so-called, may stop with the thread of the stream, which is the boundary for computing acreage, *nevertheless, the stream-bed remains the common highway of the respective owners for the conveyance of the waters to and upon the lands of the respective riparian proprietors as it was wont to do in a state of nature.*

The meander line is placed for the purpose of computing the acreage within the boudaries. But where the change of the thread of the stream is sudden or violent as would be the case here, the boundary remains the same. That is, *at the same place where the thread of the stream was as it was originally surveyed.* In support of this position, we cite the Supreme Court of Oregon:

Wykoff et al., v. Mayfield, 130 Oregon 687, (280 Pacific 340). (1929).

Page 690:

"The meander line is placed for the purpose of computing the acreage within the boundaries. The stream is the real boundary, not the meander line, whether the course is described as extending to the bank of the stream, or to the stream itself: 9 C. J. 189, Sec. 69; *Miscelli v. Andrus* (above), *Nebraska v. Iowa,* 143 U. S. 359 (36 L. Ed. 186, 12 Sup. Ct. Rep. 396)."

Page 690:

"Addition to land by accretion or loss by avulsion causes the boundary to change with the change in the thread of the stream, but where the change is *sudden* and *violent,* the boundary remains the same, that is, the thread of the stream as it was as originally surveyed: *Philadelphia Co. v. Stimson,* 223 U. S. 524, 605 (56 L. Ed. 570, 32 Sup. Ct. Rep. 340)."

THE DESERT LAND ACT

This is the Act of March 3rd, 1877, Title 43, United States Code Annotated, set forth in Sections 321, 322, 323 and 324.

"Section 321. Entry right generally; extent of right to appropriate waters. It shall be lawful for

any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre—to file a declaration under oath with the register and the receiver* of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter; provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated; and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, *shall remain and be held free* for the appropriation and use of the public for irrigation, mining and manufacturing purposes *subject to existing rights.* Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him: Provided, That no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form. (Mar. 3, 1877, c. 107, Sec. 1, 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 322. Desert Lands defined; question how determined. All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this chapter, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The *determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.* (Mar. 3, 1877, c. 107, Section 2, 3, 19 Stat. 377).

Section 323. States in which chapter applies. This chapter shall only apply to and take effect in the States of California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and North and South Dakota. (March 3, 1877, c. 107, Sec. 3,* 19 Stat. 377; Mar. 3, 1891, c. 561, Sec. 2, 26 Stat. 1096).

Section 324. Assignment of entries. No assignment after March 28, 1908, of an entry made under this chapter shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under this chapter of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (Mar. 28, 1908, c. 112, Sec. 2, 35 Stat. 52)."

In addition to *Kansas vs. Colorado,* supra, on the right of the state to determine for itself whether it will adopt the riparian doctrine, or the doctrine of appropriation, and in addition to *Sturr vs. Beck,* we submit that

PETITIONER IS ENTITLED TO HAVE THIS FEDERAL STATUTE CONSTRUED BY A FEDERAL COURT, AND TO HAVE ITS CONTROVERSIES DETERMINED BY THIS INDEPENDENT TRIBUNAL.

States Working Out Their Own Systems.

United States v. Central Stockholders Corporation, 51 F. (2d) 322-339, 329. (1931).

"In view of the long acquiescence of the federal government in the use of waters arising on or flowing through public lands it would seem that special legislation was to be reasonably expected as a basis for the litigation of its rights thereto. Without again citing specific statutes or decisions, a general view of the decisions, and of the federal legislation, leads to the conclusion that it has been the consistent policy of the government of the United States *to allow the citizens of the various states to work out their own system of law with relation to water rights without intervention or adverse legislation by the federal government.* Not only has this been the policy of the government, but appellees contend it is settled law that the government of the United States in its proprietary relationship growing out of the ownership of public lands is subordinate to and controlled by state legislation and decision upon that subject."

Burgess v. Seligman, 107 U. S. (17 Otto) 20-38, 27 L. Ed. 359, 365. (Decided Jan. 29, 1883):

Quotation from page 365 of 27 L. Ed:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exer-

cise an independent judgment in cases not foreclosed by previous adjudication."

Courts of the United States must

proceed to judgment and afford redress in every case where they have jurisdiction. They cannot abdicate the authority or duty in any case in favor of another jurisdiction.

See also:

Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546. (Decided April 3, 1893).

We quote from 148 U. S. page 534:

"In *Hyde v. Stone,* 61 U. S. 20 How. 170, 175 (15:874, 875), it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam v. Broadnax,* 39 U. S. 14 Pet. 67 (10:357); *Union Bank of Tennessee v. Vaiden,* 59 U. S. 18 How. 503 (15:472).' This principle has been steadily adhered to by this court."

Pease v. Peck, 59 U. S. 595, 18 How. 595-601, 15 Law Ed. 518, 520. (May 14, 1856).

"In all cases where there is a settled construc-

tion of the laws of a state, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under state laws, we do not feel bound to surrender our convictions, on account of a contrary subsequent decision of a state court, as in the case of *Rowan v. Runnels*, 5 How., 139. When the decisions of the state court are *not consistent* we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state.

Parties who, by the Constitution and laws of the United States, *have a right to have their controversies* decided in their tribunals, *have a right* to demand the *unbiased judgment of the court.*"

LEGISLATIVE ENCROACHMENT UPON THE JUDICIARY

The provision of Subdivision 2 of Section 70, (Appx. 1) of the Water Code, defining a vested riparian right, as construed In Re Hood River, amounts to a declaration by the Legislature of what the law was at the time of the enactment. This is a judicial question. The riparian right came through the consti-

tutional adoption of the common law, as applied and construed by the Oregon Court prior to the enactment of the Code. Such a definition is an invasion of the powers of the judiciary, and will be disregarded by the courts.

We cite:

Macartney v. Shiperd, 60 Ore. 133-143, (117 Pac. 814) (1911).

Quotation from 60 Ore., page 141-3:

"Bearing in mind that this was an action upon a contract, it is a rule of property that the laws relating to the enforcement of contracts are to be deemed a part of the agreement so that, when a judgment is rendered upon such contract, the rights of the parties after the time for appeal has elapsed become fixed and vested, and the legislature cannot, by any subsequent act, change those rights under such judgment. That the legislative assembly cannot interfere with vested rights is the doctrine laid down in Noon's Estate, 49 Or. 286 (88 Pac. 673: 90 Pac. 673). In that case, as the law stood at the death of the testator, the real property descended to the next of kin, and for the purpose of paying the debts of an estate personal property was required to be sold first and afterwards real property, if necessary. Pending the settlement of Noon's estate, the legislature amended the law in that respect so that it rested in the discretion of the county court to order a sale of the real property for the satisfaction of claims before looking to personal property for the payment of a decedent's debts. But this court held, in substance, that the rights of the heirs to the real property of their ancestor attached and became vested in the real property at his death, and that subsequent legislation could not interfere with those rights. Analogous to this is the doctrine laid down by this court in *Martin v. White,* 53 Or. 319 (100 Pac. 290), wherein it is stated that, 'when one has a mere right of action, the legislature may unquestionably pre-

scribe a reasonable time in which he may proceed; but, in case he has both title and possession and the legislature attempts to create the necessity for suit by converting an estate in possession into a mere right of action and then limit the time in which the action may be brought, it is exceeding its power.' So, here, when a judgment was rendered in this action and the time for appeal therefrom had elapsed, the right of the successful party to enjoy the fruits of his judgment became immovably established and the legislative assembly had no right afterwards to interfere, even tentatively, with that vested right, yet that is what it proposed by trying to validate attempted appeals. *Burch v. Newberry,* 10 N. Y. 374; *Germania Savings Bank v. Village of Suspension Bridge,* 159 N. Y. 362 (54 N. E. 33); *Livingston v. Livingston,* 173 N. Y. 377 (66 N. E. 123; 61 L. R. A. 800; 93 Am. St. Rep. 600); In *Re Green,* 166 N. Y. 485 (60 N. E. 183); *Ratcliffe v. Anderson,* 31 Grat. (Va.) 105 (31 Am. Rep. 716); *Edwards v. Kearzey,* 96 U. S. 595 (24 L. Ed. 793); *Barnitz v. Beverley,* 163 U. S. 118 (16 Sup. Ct. 1042; 41 L. Ed. 93); *Anderson v. Hygeia Hotel Co.,* 92 Va. 687 (24 S. E. 269); *Bettman v. Cowley,* 19 Wash. 207 (53 Pac. 53; 40 L. R. A. 815); *Humphrey v. Gerard,* 83 Conn. 346 (77 Atl. 65); In re *Handley's Estate,* 15 Utah 212, (49 Pac. 829; 62 Am. St. Rep. 926); *Village of New Holland v. Holland,* 99 Ill., App. 251.

5. Again, the Constitution of this State (Article 3, Section 1) provides that 'the powers of government shall be divided into three separate departments: The legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided.' In *Griffin v. Cunningham,* 20 Grat. (Va.) 31, the Supreme Court of Virginia quotes with approval the language of Judge Cooley as follows:

'To declare what the law is or has been is judicial power; to declare what the law shall be is legislative.'

In *Thomas v. Portland,* 40 Or. 50 (66 Pac. 439), Judge Wolverton uses this language:

'A statute which operates to annul or set aside the final judgment of a court of competent jurisdiction and to disturb or defeat rights thus vested is inoperative and void. By reason of the distribution of powers under the Constitution assigning to the legislature and the judiciary each its separate and distinct functions, one department is not permitted to trench upon the functions and powers of the other.'

The act in question does not profess to give to litigants any new right of appeal. It recites that there is doubt about the construction of the acts of the legislative assembly that have been already passed relating to appeals, and, based upon that alleged doubt, it proceeds to construe those previous enactments and to declare their meaning validating appeals, notices of which had been theretofore served. This is plainly an invasion of the judicial power by the legislative assembly, and is not admissible: *Sanders v. Cabaniss,* 43 Ala. 173; In re Boyett, 136 N. C. 415 (48 S. E. 789: 67 L. R. A. 972; 103 Am. St. Rep. 944); *Lindsay v. United States Savings & Loan Company,* 120 Ala. 156 (24 South. 171: 42 L. R. A. 783).

The statute in question does not operate to extend the period for taking an appeal, or to include as an appealable order the action of the court in denying a motion for a new trial."

The foregoing case was followed and cited in an opinion of the Oregon Supreme Court, of February 16, 1933, in

Roles Shingle Co. v. Bergerson et al, 142 Ore., 131 (19 P. (2d) 94) (1933).

See also:

Cooley's Constitutional Limitations, 7th Edition, pages 134-5-6-7,

from which quotation is made in the main brief.

INJUNCTION RELIEF

In addition to the authorities cited or referred to in the body of the brief, we submit the following:

Phipps v. Rogue River Valley Canal Co., 80 Ore. 175, 181; 156 Pac. 794, (1916):

"The infliction of 'irreparable injury,' such as a court of equity will enjoin, includes also that degree of wrongs of a repeated or continuing kind which produce hurt, inconvenience or damage that can be estimated only by conjection, and not by any accurate standard of measurement: 29 Cyc. 1224; *Bernard v. Willamette Box & L. Co.,* 64 Or. 225, 129 Pac. 1039)."

See also

Gould v. Eaton, (Cal.) 49 Pac. 577-8; 38 L. R. A. 181, 183:

"The plaintiff's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner, he has a right to the flow of the entire stream, as against any diminution thereof by one who is not a riparian owner, and the *claim of the defendants that they have a right to divert a portion of its flow authorizes him to invoke the aid of equity in order that this claim may not ripen into a right. Moore v. Clear Lake Waterworks,* 68 Cal. 146; *Stanford v. Felt,* 71 Cal. 249; *Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal Nav. Co., L. R.* 7 H. L. 705."

Farnham, Waters and Water Rights, Vol. II, page 1722, Section 530: We quote from the section:

"530. Changing current.—The action of running

water is such as to wear away the banks against which the current is directed, and therefore one riparian owner has no right to change the flow of the current so as to direct it against the land of the opposite owner. In the important case of *Bickett v. Morris,* the court held that a riparian proprietor has no right to erect a building in the alveus of a stream without the consent of the opposite proprietor, and the opposite proprietor may compel him to suspend such operation without proving that any damages were actually sustained by him by the erection, unless the encroachment is so slight and trivial as not to involve any risk of future injury. The extent and limitation of this doctrine were fixed in *Belfast Rope Works Co. v. Boyd,* where it was held that the construction of a weir in a stream so as to interfere with the flow of the water was actionable. The court adopted the language of Lord Blackburn in *Ewing v. Colquhoun,* in which he explained *Bickett v. Morris* as holding that where an erection is a present, sensible injuria to the proprietary right of the owner of the other part of the alveus, or of the opposite bank of a running stream, he may have it removed, on the ground that there is a present injury to the right of property if it is impossible to predict that it may not produce serious damage in future, though the complaining party is not in a position to qualify present damage."

Farnham further says on page 1771:

"551. No injury need be shown.—Some of the earlier cases, which were decided upon the ground that priority of use was the basis of rights in a flowing stream, seem to indicate that, in order to give the upper owner a right of action, he must show that he has been injured. But it has become settled that the right to the natural flow of the stream is a natural right, given by nature, and that it depends solely on ownership of the banks of the stream, regardless of whether any use has been

made of it or not. The conclusion must necessarily follow that an interference with this right will entitle the riparian owner to redress, whether he can show any actual injury or not. Injury is shown as soon as it appears that the water is backed over the line."

The Oregon Supreme Court in 1901 followed the doctrine that the riparian owner has the right to protect the banks and maintain the stream in its natural channel, quoting from Long on Irrigation in the following case:

Cox v. Bernard, 39 Or. 53-63, (64 Pac. 860). (Decided May 4, 1901).

Quotation from pages 60-61:

"Mr. Long, in his work on Irrigation (section 9), commenting upon like conditions, says: 'Every proprietor of lands on the banks of a natural stream has an equal right to have the water of the stream to continue to flow in its natural course as it was wont to run, without dimunition in as either of these conditions may result from the reasonable use of the water for irrigation or other lawful purposes by upper proprietors.' It is thus made apparent that the plaintiffs are entitled to have the water of Cottonwood Creek come down to them, undiminished in quantity and unimpaired in quality, except so far as may result from reasonable use by upper riparian proprietors; *and, to the end that they may insure it coming down, they assuredly have the right, when they can not be regarded as tresspassers, to maintain the banks of the stream in their accustomed and natural condition, so that the water may not be diverted or carried off by reason of washouts, rents, or crevasses therein.* The rule is well established that a riparian proprietor may protect his premises against overflow of the stream: *Pierce*

v. Kinney, 59 Barb. 56. And it is reasonable that he may also protect the banks, and thereby secure the use of the water which would naturally flow within them."

Rigney vs. Tacoma Light and Water Co., 9 Wash. 576, (38 Pac. 147).

Quotation from page 149 of 38 Pac.:

"The right of the riparian proprietor to the flow of the water is inseparably annexed to the soil and passes with it not as a mere easement or appurtenant, but as a part and parcel of it. Use does not create, and disuse cannot destroy or suspend it. *Johnson v. Jordan,* 2 Metc. (Mass.) 239; *Lux v. Haggin, supra.* The riparian proprietor has no property in the water itself but a simple *usufruct* while it passes along. 1 Wood, Nuis. (3d Ed.) p. 471. The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament. *Cary v. Daniels,* 5 Metc. (Mass.) 238. And this right is a substantial one, and may be the subject of sale or lease, like the land itself. 1 Wood, Nuis. (2d Ed.) p. 412. The respondent, having this clear legal right to the natural flow of the waters of Clover Creek over his lands, cannot be unwillingly deprived of it without compensation or due process of law, even by the public, or for a public use, without disregarding the fundamental law of this state. Even if his damages were shown to be slight, or merely nominal (which is not shown), the right still exists, and cannot be violated with impunity. Actual damage is not indispensable as the foundation of an action. *It is sufficient to show a violation of a right. The law will then presume some damage."*

THE CEMENT COMPANY IS THE PARTY IN INTEREST.

As between respondents, the cement company is the party in interest. Exhibit A to respondents' (R. 38) is

the contract, of date October 19, 1926, under which the city sold to the cement company respondents' lands and water rights involved herein. Petitioner called Mr. Muirhead, vice president and in charge of the cement company's operations involved herein, and his testimony upon that subject is as follows:

> "Witness testified that the copy of the contract dated in October, 1926, and set up in defendant's answer is the contract between the defendants and was in force at the time witness was testifying, that there had been no extension of it but one would soon be necessary; that the company had paid the city upon it a $100.00 a month, amounting to $5,600.00. (104-15)." (R. 125).

The trial of this cause was begun on the 23rd day of April, 1931, (R. 106) and the foregoing testimony was given at that session, and shortly after that date. So, on the basis of the monthly payments required under the contract, the amount now paid on the purchase price is more than ten thousand dollars of the $22,500.00 total. The relation of the respondents to each other, under that state of facts, is shown by the following cases from the Oregon Supreme Court, to wit:

In

> *Sievers v. Brown,* 34 Oregon 454, 456, (56 Pac. 171), (1899),

the Court said:

> "1. A bond for a deed transfers to the obligee an equitable interest in the premises agreed to be conveyed, which is measured by the amount paid on account of the purchase. The legal title remains in

> the obligor, in trust for the purchaser, who, upon payment of the entire consideration, acquires the whole equitable interest, and may maintain a suit to compel the specific performance of the contract, if the obligor refuse to keep his covenants."

And in

> *Quillen v. Schimpf,* 133 Or. 581, 587 (291 Pac. 1009), (1930),

the Court said:

> "In *Burkhard v. Howard,* 14 Or. 39 (12 p. 79), it was held that the effect of a bond for a deed is to transfer the equitable title in the land to the vendee, and that the vendor holds the legal title merely as security for the sum named therein. See also, *Sayre v. Mohney,* 30 Or. 238 (47 P. 197)."

Hence, the city holds the legal title in trust for the cement company, which, upon payment of the entire consideration, will become entitled to the deed.

MATERIAL FACTS.

We set forth the facts showing the necessity for the issuance of the injunction for the preservation of petitioner's rights. These describe the dynamiting of the river bed adjoining the riparian lands of the respective parties situated upon either side of the stream. They show the intention of the Cement Company in the dynamiting of the river bed, and the effect thereof; that the excavation of the rock shattered by the dynamiting, and the lowering of the Cement Company's canal connecting with the excavation that would be made in the river bed by the removal of said rock, would suck all of the water of the river from petition-

er's land and render it worthless; that the land has a value of $30,000.00 for power purposes, and that the petitioner needs it for the purpose of erecting thereon what is called a "stand-by" plant for the generation of electricity for sale and distribution; the necessity for such a stand-by plant to be built near the point of distribution of the current; that the Cement Company intended to use practically all of the water of the river for the manufacture of electricity for its own uses, and also for sale. They show these and other facts making evident the necessity for petitioner to ask the protection of the courts of equity against the destruction of its property.

THE DYNAMITING OF THE RIVER BED

It is alleged in the bill of complaint (R. 11) paragraph XI, and admitted in the answer thereto (R. 24) paragraph XII, that on the evening of July 21st, 1930, the cement company, without the knowledge or consent of the petitioner, exploded large quantities of dynamite in the bed of Rogue River at the point in controversy, and which explosion shattered and broke the rock bed of the river for a distance up and down the river of approximately one hundred feet, by from twenty-seven to fifty feet in width; that the dynamite had been inserted in holes which had been drilled in the rock bed of the river at said point and below the bed of the stream, and that the cement company intended to forthwith remove the rock shattered by the

explosion.

The intention of the cement company was to thereby deepen the channel of the river on its side of the thread of the stream to such an extent that the excavation would be sufficient to take 1347 cubic feet per second of the waters of the stream, which is more than twice the flow of the stream at low water.

It will appear from the evidence cited below that at the lower end of this deep channel so to be made, the cement company was lowering the bed of its canal to carry that water into its proposed power plant at or near the site of the little city plant of the respondent, Gold Hill, which the cement company had acquired through its contract of purchase.

Plaintiff's (Petitioner's) Exhibit 4—Photo.

Plaintiff's (petitioner's) Exhibit 4, (R. 119) is from a photograph taken by the cement company just prior to the explosion of the dynamite. A copy thereof is inserted in this brief, and indexed herein.

Mr. Muirhead, respondent's vice president in charge of operations, testified as to Exhibit 4; that the rock bottom had been drilled, and pegs inserted therein, which pegs show in Exhibit 4. The condensed statement of his testimony, taken from the record, is as follows:

> "Mr. Muirhead testified that Exhibit 4 was taken a couple of days before the blasting ocurred that it shows 220 holes from which wooden pegs protrude, these being the holes drilled to receive

the dynamite. The witness pointed out the pegs in the picture showing the location of the holes." (R. 118).

Mr. Muirhead described the drilling, etc., in the following statement:

"The witness stated that the pegs marked '1' on Exhibit 4 are the type of pegs that were driven into holes that were drilled into the rock, that some of them are deeper in the holes, but they can be seen; that the holes were drilled with fairly uniform spacing throughout the area; that the entire area to be blasted was drilled at regular intervals, so that the blast would clean it out as clean as possible, and leave no more ridges or crevices than could be helped; that some of the holes were drilled in the water between the ledges of rock; that in proportion to the area involved there (102-13) were as many holes in between as there are shown on the rock; That is—as many under the water as on the rock; that they are shown in such places as he then designated on the exhibit by an arrow pointing to them with the number '1' in the area. Some holes were as much as three feet under the water and hence do not show in the photograph. That at first they had intended to excavate so as to get a greater capacity than they were getting by the present blasting. But now, being only allowed to go to the thread of the stream, there was not the necessity for having such a large area as previously existed and since the holes were already drilled, the company only shot the one that it needed to make the area required, being those adjacent to the channels, *because it would take less powder and make less rock to be removed, the powder and the removal being expensive* * * * * * that they endeavored to follow the channels with the blasting *so as to keep the rock that would have to be hauled away to a minimum,* using the natural channel." (R. 121-122).

Plaintiff's (Petitioner's) Exhibit 5—Photo.

Plaintiff's (petitioner's) Exhibit 5, (R. 123) is from a photograph taken by the cement company of the portion of the river bed, immediately after it had been shattered by the explosion of the dynamite. The record shows that Exhibit 5 was taken three days after the explosion, and covered the same area as shown by Exhibit 4. (R. 122).

Witness Muirhead testified:

> "The witness stated that the two photographs, Exhibits 4 and 5, represent the condition before and the condition following the blasting. (Tr. 30). That the date of the taking of the picture is on each exhibit, Exhibit 4, July 13, 1930, Exhibit 5, July 24, 1930, and that the explosion occurred on the 21st of July." (R. 125).

A comparison of Exhibit 4 with Exhibit 5 will show the effects of the tremendous explosion that was made. And it becomes interesting to know the real reason why this should be done.

Some months prior to the explosion, a former case between the same parties, involving the same property rights, was terminated in the Court of Appeals, and the opinion in that case is to be found in 35 Fed. 2d, 317. (1929).

Based upon the mandate issued out of the Court of Appeals, in said prior cause, there was entered in the District Court, on the 20th day of December, 1929, in said suit No. E-8991, a modified decree, (R. 172-9). The said explosion occurred in the July following the

December in which said decree was entered, and while the determination of the question involved was unsettled.

Dates of Drilling.

The drilling was done while that former case was pending, and about ten days before its decision.

Mr. Muirhead, of the cement company, testified concerning the drilling, as follows:

> "He stated that the drilling preparatory to the explosions was begun October 16, 1928, and completed November 20, 1928; that the drilling was finished about ten days before the decision in a prior case pending; he testified that he was in charge of the explosions, the operation at the time that the explosion was made and had charge of it personally." (R. 324-5).

THE PURPOSE OF THE EXPLOSION

The condensed statement of the evidence shows the following from the testimony of Mr. Muirhead, in charge of the cement company's operations:

> " 'It is our intention to shoot a stretch through there approximately thirty feet wide and five feet deep below the water stage at the date of our engineer's estimate, the original estimate which was 1069.40.' That his engineer could testify more accurately, but that it was apporximately an area thirty feet wide and five feet deep and as long as was necessary to go through there which was approximately 280*feet;* that there was a diagonal stretch that they blasted out which, of course, should take the measure at the maximum width, which would be more than thirty feet; that the area was originally the channel which was passing thirty or forty or more second-feet of water; that

we blasted simply to utilize such natural passage that was there to save power." (R. 109).

The first trial of the instant cause was had before His Honor, Mr. Justice Bean. After the testimony had been completed, Judge Bean died, resulting in a retrial. Much of the testimony taken before Judge Bean was introduced here, before His Honor, Mr. Justice Fee, who tried this case in the District Court. From the testimony taken before Mr. Justice Bean, and introduced here, we submit the following. This is an examination by Judge Bean of Floyd W. Allen, construction engineer for the cement company:

"'COURT: How wide? MR. ALLEN: Being a width of 30 feet in width. COURT: What depth? MR. ALLEN: And a depth of 6 feet below low water. COURT: What? MR. ALLEN: Six feet below low water. COURT: How much is that below,—A. (Mr. Muirhead): That would be an elevation of 63. COURT: How much is that below the ordinary depth of the water? MR. ALLEN: That is 12 feet in here. COURT: You said something about five feet. MR. ALLEN: Holes were drilled five feet, so you have to take down six feet in order to get that area. Thence north seven degrees west, thirty feet to the point of beginning. By taking a line thirty feet in width and approximately 220 feet in length, and to be excavated to a depth of six feet below the water level.'" (99-10) (R. 116).

Further questions by Judge Bean:

"'Q. How many second-feet of water do you require for operation? A. In the ultimate development of the 2,000 kilowatts we require the entire 1347 second-feet; on the thousand we require 675 second-feet; thirteen hundred is 930 second-feet. COURT: What is the capacity of your proposed de-

velopment? A. It is proposed—the first development will be a thousand kilowatts plus the present three hundred. COURT: I asked how much it was. I don't care how you arrived at your conclusion. I would like to know the amount. A. The first development (100-11) would be 1300 kilowatts. Q. approximately how much horsepower? A. That would be seventeen hundred horsepower. COURT: Is that the proposed capacity of the development as now planned? A. As now planned, yes. COURT: Thirteen hundred? A. Wait a second; we planned for the full two thousand kilowatts. COURT: You said you proposed to lower your canal; four feet; or four and a half, whatever it was: now, how much did you estimate that that would provide? A. It would provide 2,000 kilowatts delivered at the cement works. COURT: That is the limit of your proposed development? A. Yes, that is the limit of our proposed development. COURT: *How* many second-feet of water would you require for that? A. 1347 second-feet. In other words, we would not be able to develop that full amount of— COURT: I am just asking what you proposed to do'." (Tr. 25). (R. 117-8).

There was also offered the testimony of Allen before Judge Bean, as follows:

"I desire to offer in evidence also from this testimony the following: It is just question and answer from page 106 of the testimony of the witness Allen: 'How much more water would draw through there when you lower your canal than if you had not excavated this blasted out area? A. Well, would draw between — in other words, this whole thing is contemplated to draw the 1347 second feet through it, at a stage of the river which will permit it'." (R. 117).

and also the testimony of Mr. Muirhead:

"He testified that it is the intention of defend-

ant Cement Company to deepen and widen the existing canal sufficiently to pass the amount of water that it will be able to get with its diversion in the river as contemplated in this case.

Asked to state how much water this would be in second-feet, he replied it will be large enough to take all of the water that we have under permits and application, 1347 second-feet; not that the company expected to get that much all of the time, but to have it so that they can use it when it is available.

Asked if the plant was to be constructed so as to draw in and utilize 1347 second-feet, he answered: 'Yes'." (Tr. 11). (R. 112).

"Asked whether he had answered the question as to how much his company intended to widen and lower its canal, he stated that he thought that he had said that it would increase its dimension to a size that would permit the taking of the entire amount of water that the Cement Company would be permitted to take *by its permits and applications.* (Counsel agree that the witness here refers to the *permits;* that the permits are now in the name of defendant City and *covered by the contract between the defendants,* copy of which is attached to the answer)." (R. 114).

Plaintiff's (petitioner's) Exhibit 13 (R. 149) was used by Mr. Muirhead to designate the area which he said he intended to excavate to a depth of six feet below the low water, or to an elevation of the water surface 1063.5. The witness was asked to indicate upon this exhibit the portion of the area to be removed as a result of this blasting. We believe his testmiony, with the exhibit, will give the information:

He testified:

" 'This area to be excavated 6 feet below low

water or to elevation of 1063.5 plus or minus.'

His attention was directed to the arrow pointing to certain rocks and to the heavy lines on the map and also to the two light lines. He was then asked to point out what operation the company intended to indicate by said legend as to the portion of the area to be removed; whether it was all of the portion embraced within the heavy lines or (92-3) were embraced in the light lines. He answered:

In the heavy lines; that the light lines represented the boundaries of the reef and islands as they existed prior to the shot, and the solid light lines represented the area that is now in a shattered state, and it is difficult to say whether it is in the original channel or solid rock but that now it is apparently solid because of the 'cast up' from the blast." (R. 108-9).

EXHIBITS.

For a better understanding of testimony that follows it will be helpful to examine certain of the exhibits illustrating the testimony, and they are set forth as follows:

PLAINTIFF'S (PETITIONER'S) EXHIBIT 9 (R. 135)

This exhibit was made by Olsen, petitioner's engineer, to illustrate the conditions of the lands and river on petitioner's land that would result at low water from a removal of the rock shattered by the explosion and the deepening of the cement company's canal where it would receive the water through the opening made by the blasting. (R. 137).

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 10 (R. 139)

This exhibit was made to illustrate a partial diversion of the water from petitioner's lands, which the defendant Muirhead testified they intended to make by excavating the shattered area. His testimony, elsewhere quoted under the heading "Cement Company Would Make a Fish-way of Petitioner's Lands," was to the effect that when the cement company's plans were carried out, the excavation made, and the canal deepened, there would yet remain, at the ordinary stage of the river, about 122 second feet on petitioner's side of the river, on its said land. (R. 114).

The reef being the controlling factor, would, as is shown on Exhibit No. 10, leave a strip of dead water, from which would trickle the 122 second-feet through the cement company's fish-way. The Exhibit No. 10 and its use is further explained in the condensed statement, as follows:

> "As to Exhibit 10 he said this was supposed to indicate a partial diversion; that it would be difficult to state how much water would be flowing through the probable course of the canal on the stream, as inidcated on the exhibit. The exhibit indicates no definite amount of water. That the exhibit is made to illustrate the thread of the stream regardless of the quantity of water flowing in the stream, and based upon an elevation of 1069 at the headgates. That no one could make a calculation of the amount of water flowing over the irregular reef at 1069; that it has a very irregular surface, and he did not make any calculation; that he

did not think an engineer could make a very accurate determination of the flow over the reef at a stage of 1069 and 1069.4, but only an approximation." (R. 158).

"The witness then testified that he had then prepared plaintiff's Exhibit 10 for Identification, which was a map illustrating conditions when the diversion should be only partial. The map indicated that there would be a small amount (112-23) flowing down the east side designated on the exhibit 'probable course.' He stated the use of the word 'probable' was due to the fact that it was practically impossible to exactly show just where that small stream would flow due to the irregularity of the bottom of the river, as it now exists, similar to the reef. It would have a tendency to move the thread westerly from twenty to forty or sixty feet, and in some places scarcely any distance; but dependent, as said before, upon the river bottom; but there would be a tendency to move, and that would be always in a westerly direction, and there would be undoubtedly portion of Government Lots 1 and 2 entirely dry with no water on them, and possibly in some places little pools of stagnant water would be left." (R. 141).

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 12 (R. 145)

On said exhibit are the letters A-B, indicating the reef upstream on the West, respondents' side, of the river, and the letters C-C, being the controlling reef on the east side of the river. This cross-section shows in detail what would happen if the water were drawn down to an elevation of 1068 at the cement company's headgates; that then, all of the water would be on the west side of the river, due to the fact that the lowest

point of rock on the easterly side of the reef is about 1068. (R. 147).

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 22 (R. 340)

This exhibit and cross-section shows the outline on the reef C-C as the same was located by soundings made in the river on April 26th, and 27th, 1931. (R. 348). Witness Olsen described the manner in which the soundings were made, and the care with which they were taken. (R. 351-2-3.) The soundings were made to obtain an accurate contour of the bottom of the river at the controlling reef C-C.

PLAINTIFF'S (PETITIONER'S) EXHIBIT No. 2 and No. 23 (R. 350)

Plaintiff's (petitioner's) Exhibit No. 2 and No. 23 is a map showing the river in a state of nature, at normal flow, and prior to the blasting, the blasted area being indicated on the west side of the river by an arrow pointing thereto from the words "blasted area." Exhibit No. 2 became Exhibit No. 2 and No. 23. Olsen testified that he had platted on Exhibit No. 2 the reef indicated by the letters C-C, with the word "reef." He stated that he had also made Plaintiff's Exhibit No. 23; that Exhibit No. 23 and No. 2 are identical, with the exception of the outline of the reef C-C, so that the two exhibits are really the one, No. 2 having the reef indicated on it was marked No. 23, and the exhibit became No. 2 and No. 23 (R. 347-8).

The condensed statement of Olsen's testimony shows the following:

> "The witness testified that he prepared plaintiff's Exhibit 9 for Identification to show the effect on the thread of the stream if the diversion thereof should be complete, and that this was plaintiff's Exhibit 9; that it is the same as plaintiff's Exhibit 2, with this difference: That the water surface as shown on Exhibit 9 is during low flow with the complete diversion into the canal." (R. 137).

And the following additional excerpts:

> "But this particular map (plaintiff's Exhibit 9 for Identification) shows the conditions under the circumstances when all of the water would be diverted and no water would be flowing on the east side of the river." (R. 138).
>
> "The witness testified that assuming that the canal is so lowered and widened (according to former testimony), and the (111-22) diversion complete, that Exhibit 9 for Identification correctly shows the thread of the stream as it would then be; that Exhibit 9 shows the then condition of the south portion of plaintiff's Lot 1 and the condition of plaintiff's Lot 2 with reference to the river under such conditions. It shows no water passing over the reef, C-C, and shows the thread of the stream moved over all the way from 60 to possibly 150 feet; 60 feet on the upper end and 150 on the lower end." (R. 137).

Exhibit No. 2 and No. 23 is inserted in this brief and indexed therein. Its purpose is to show the river in a state of nature, and to bring out prominently the reef C-C which is the controlling reef, which controls the water currents on petitioner's side of the river.

EFFECT OF REMOVING FROM THE BED OF THE RIVER THE ROCK SHATTERED BY THE DYNAMITE.

We quote from the testimony of Harry Olsen, engineer for petitioner. He refers to Plaintiff's Exhibit 2, which is a map originally introduced for the purpose of showing the situation of the river with reference to the currents and reefs of rock therein at the point of contest, prior to the removal of the blasted area, or the deepening of the cement company's canal at that point. It showed the river in a state of nature.

The Exhibit 2 was later made Exhibits "Plaintiff's Exhibits No. 2 and No. 23." (R. 350). This change in designation resulted from additions made thereto, and the exhibit as it originally was, and as it is, plus the changes, is described elsewhere in this appendix at page 129.

The effect of removing the shattered area, and deepening and widening the canal accordingly, would be to substantially change the thread of the stream, leaving most of petitioner's lot 1 dry, and all of petitioner's lot 2 dry, and changing and varying the thread according to the requirements of the cement plant.

For a better understanding of conditions, we submit first the testimony of Harry Olsen. He entered the employment of the petitioner in 1923 as an engineer. He is a civil hydraulic engineer and a graduate of Stanford University in that profession, with fifteen years of ex-

perience. His qualifications were admitted. (R. 128-129).

Mr. Olsen described Exhibit 2, which had been prepared by him, and which shows the condition of the river normally. He also described the manner in which the waters of the stream at the place in question were divided by natural reefs of rock.

An examination of that "Exhibit 2, and 23" will be helpful to an understanding of the following testimony given by him:

> "He testified that he was familiar with the portion of the river at the property involved here; that in the stream there were natural objects that were controlling factors in the diversion of the water; that he had indicated them on this map, Exhibit 2. That the flow of the stream at this point is really controlled by natural rock barriers or reefs which, on the map would be described as running along the line A to B down from B to C. And from C to C again, the letters being repeated C-C; that this is a natural reef and the tendency along the line A-A and above is for the water to come down the river so as to discharge approximately half on either side — half on the east side and half on the west side of the stream; that the amount of the water there coming down is practically evenly divided at that point.
>
> That the dividing line between Lot 1 and Lot 8—that is, plaintiff's Lot 1 and the defendants' Lot 8—is the thread of the stream; that as the water passes this line A-A a portion of it flows over this reef designated as B-C in a westerly direction. That is to say, from a point 500 feet down stream from this line A-A there is approximately two-thirds of the flow of the river flowing on the west side of the thread of the stream and approxi-

mately one-third on the east side. Then as it flows down the tendency is for it to flow back into the natural channel again so that down below and opposite plaintiff's Lot 1 and defendants' Lot 8, there is again practically half of the stream on the east side and (109-20) the other half on the west side.

That this reef so described indicates the natural division of the water in a state of nature; that the exhibit correctly shows the location of these lands of the respective parties and the stream and the thread thereof and the reef. That as pointed out the reefs are the controlling points in the division of the water under natural conditions and the area shown above the present headgates of defendants' power canal could be designated as a forebay; the power-house is not shown on the map but is approximately half a mile south of the headgates shown." (R. 130-1).

Quoting further:

"He stated that he had drawn or platted the description of the blasted area to be removed according to the testimony given at the former trial of this case, thirty feet wide by 220 feet long; that this information was taken from the testimony of Allen, defendant Cement Company's engineer. That this area is the same as is shown in yellow (117-28) in plaintiff's Exhibit 2 as there corrected by the witness to avoid an obvious error, mentioned above." (R. 151).

We also add the following from Olsen's testimony:

"That as far as the physical construction is concerned the only thing necessary now to be done to draw off the entire flow, would be to remove the rock in the blasted area, and deepen the canal; that the canal would have to be deepened from three to four feet." (R. 157).

As to the effect of removing the shattered rock, Olsen testified:

"It was then stated to the witness that the testimony already offered showed that the defendant Cement Company intended (110-21) to lower the bottom of its canal leading to its electric plant from 4 to 4½ to 5 feet.

He was then asked if the canal was so lowered and its shattered area of the rock removed, what would be the effect of the thread of the stream as to the amount of water upon plaintiff's Lots 1 and 2. He answered that during low flow of the river with the lowering of the canal and the enlarging thereof and the removal of this rock, the tendency would be to divert the entire flow of the river over to the west side, taking it down into the canal, leaving the lower portions of Government Lots 1 and 2 absolutely dry, and the effect on it would be to move the thread of the stream westerly anywhere from 60 to 150 feet; that there is that variation in distance as given, due to the fact that at the point designated on Exhibit 2 is a reef, while up to that point the thread of the stream would not be moved. The reef referred to is that marked "C-C" on Exhibit 2.

The witness corrected his testimony and said that the change thus made would take the water entirely off of plaintiff's Lot 2. (Tr. 50)." (R. 132-133).

Mr. John Boyle, petitioner's engineer and assistant manager, testified upon the effect on the water on petitioner's lands and on the flow of the river. He referred to and used Plaintiff's Exhibit 2, now called No. 2 and 23.

We quote from Engineer Boyle on the same subject:

"The witness took plaintiff's Exhibit 2 and testified that the reef shown thereon extends across

the river from the west (140-48) side along the section marked 'A-B' to nearly the center of the river; thence it extends southerly along the section marked 'B-C', this section being near the center of the river; it then extends easterly to the east shore of the river along the section marked 'C-C'. That the effect of this reef has upon the division of the waters of the stream between plaintiff's lands and those of the defendant's is this:

It retards the flow of the river above the reef, the water flowing more rapidly from the down stream side of it. The division of the water is approximately one-third through the reef shown as A-B, one third from east to west over section B-C. and one-third over section shown as C-C. That the reef marked 'A-B' runs through the head of the shattered area. That at the time he looked the premises over, immediately following the explosion of the dynamite, he did this with reference to the effect that this work might have upon the flow of the stream, and the division of the water between the parties hereto, if the rock shattered by the explosion should be removed from the shattered area." (R. 192-3).

Mr. Boyle further testified:

"His attention was called to the testimony of Mr. Muirhead, and to Mr. Muirhead's intention of having the shattered rock removed and the sides of the blasted area leveled up and smoothed, and he said that if the area described by Mr. Muirhead is excavated to completion, the effect would be that *all of the water from the river could be taken to the west side and used through the proposed power-canal.* That it would be taken through the power plant as the load became sufficient to require that quantity of water; that the channel to be so completed, as described by (141-49) Mr. Muirhead, would have sufficient discharge area to permit the discharge of 1347 second-feet of water at a water surface elevation of 1069, 1068 or

1067, whatever surface elevation it was there desired to draw the water down to in order to produce the power required at the cement mill; this result, of course, to be contingent upon the completion of the intake gates of the canal and the excavation of the canal, as shown upon plaintiff's Exhibits 6 and 7. That in this he was including the widening and deepening of the canal as had been testified to, in order to make the full use of the 1347 second-feet. That when this should be done the following would be the effect of the water upon plaintiff's Lots 1 and 2, namely:

The maximum amount of power could be obtained from the proposed power-house when the water surface elevation is maintained so no water is running over C-C, as shown on plaintiff's Exhibit 2.

Asked what effect would this have upon the thread of the stream, what change if any would thereby be made from the same as it now is shown on plaintiff's Exhibit 2, he answered:

That when there would be no water flowing over section marked 'C-C', the thread of the stream would be moved westerly at section C-C to the center of the forebay or intake of the power canal. Asked how much approximately the thread of the stream would be fluctuated by these uses of the water according to the demands of the cement mill, he answered: That the thread of the stream would be moved to the center line of the forebay or intake canal opposite C-C, or it could not be moved at all, according to the load required at the cement mill, and the amount of water permitted to flow over section C-C. *That the thread of the stream as indicated on said Exhibit 2 would be fluctuated back and forth, according to the load from* (142-50) *time to time as utilized at the cement mill.* That the greatest distance that the thread of the stream would thereby be changed, moving westward from its present location, would be *one hundred to one hundred fifty feet, opposite the lower*

end of Lot 1, between the south end of Lot 1 and section C-C.

Asked what would happen if the varying quantity of electricity that would be required from time to time with reference to the amount of water that would be left on plaintiff's Lot 1, during the fluctuation operations; whether there would be places that would be entirely without water above the line C-C and the condition below that line.

He answered: That above section C-C he doubted if any operations would take all of the water out of the *pond,* which might be called a 'forebay' of the intake gates; that the river bottom there is *considerably lower* than the water surface; that at section C-C, which controls the flow of the water on the east side of the river, there would be no water flowing, and so below or down stream from section C-C, the river would be dry at times, and having water flowing on it at times, depending upon the operation of the cement mill. That during such conditions there would be water flowing over the spillway below C-C; that if the water surface is maintained below section C-C at the spillway elevation, Lot 1 would be dry as all of the water would be flowing through the power canal through the power plant." (R. 193-5).

"But if the shattered rock be not removed he said: That if the shattered area should not be removed but left as it is, and there is just a natural flow of the stream, then under normal conditions two-thirds of the water would flow to the west side below and west of A-B and B-C without excavating in the reef." (R. 196).

WITH THE SHATTERED AREA REMOVED, AND THE CANAL WIDENED AND DEEPENED, ACCORDING TO THE CONTENTIONS OF THE CEMENT COMPANY, AS EXPRESSED IN THE RECORD BY BOTH MUIRHEAD AND ALLEN, THE OPERATION OF THE CEMENT MILL WOULD, AT TIMES OF MEDIUM FLOW, TAKE ALL OF THE WATER IN THE RIVER.

Respondent cement company's engineer, Floyd W. Allen, testified upon that point, as follows:

> "Q. But as a matter of fact in the operation of your cement plant, when you needed all the power you could get, you could take all that water, couldn't you?
>
> A. If you would want to set up a condition, ideal that is for taking all that water; probably you could under certain conditions take all the water in that river; but from the plan of operation and our intention of manufacturing both the electrical energy and how we intend to control the plant, plus the control of manufacturing cement, and the load we intend to put on it at that time, I do not think we will draw down the river below 1069.
>
> But the fact remains that by the operation of your cement mill to get the power, all the power that you can, you can do it, can't you?
>
> A. *I have repeatedly said that we could.*" (R. 379).

Upon this same subject, Mr. Olsen, for the petitioner, testified at length. We quote:

> He testified that he understood the operation of the electric plant to be installed as described by witness Muirhead; that the operation of a such a plant would be governed by the power requirements at the cement mill, and that as these power

requirements increased more water would be required; that as they decreased less water would be required, with the resultant effect that at times there would be no water going over the reef designated on the line C-C, but at other times there might be a slight amount of flow over on the east side of the river." (R. 137).

"He testified that the controlling factor as to the amount of water which would be drawn from the upper part of the stream and diverted from the east side woud be the amount of power required by the Cement Company at the cement mill." (R. 156).

We quote Engineer Boyle upon the same subject:

"He stated that by lowering the water at the headgates of the defendant's canal, all of the water could be drawn up to a discharge of 1347 second-feet. That if, at the time, there were only 1,000 second-feet of water flowing in the river, the operation would draw all of the water flowing on either side of the west bank above the point into the canal." (R. 209).

Mr. W. H. Muirhead, Vice President, and in full charge of the cement company's operations in all the matters with which we are concerned, testified as follows:

THE TYPE OF POWER PLANT WHICH THE CEMENT COMPANY INTENDS TO INSTALL, WITH THE APPROPRIATIONS SOUGHT TO BE MADE.

We read from the record:

"He testified that his company intended to build a hydro-electric plant for the manufacture of electric power by the use of turbines and generator

with the use of the flow of the water, and a given head and volume; that the turbines will be equipped with gates that will be automatically operated according to the amount of power used at the cement mill; that when the electrical load is taken at the cement mill the amount of water required to make that quantity of electricity will automatically be let into these turbines or wheels and only that amount of water; that it will operate in that way except that here is a maximum which the company can take because if the company drew more than a certain amount of water it would drop its head and lose efficiency." (R. 111).

John C. Boyle, assistant general manager of petitioner, an engineer, a graduate of the University of California, and whose qualifications were admitted, (R. 188), heard the testimony of Mr. Muirhead, and concerning the type of plant, testified, among other things, as follows:

"The witness heard the testimony of Mr. Muirhead, vice-president and treasurer of the Cement Company, and in charge of the operation of the cement plant. He stated that he heard the description given by Mr. Muirhead of the kind of plant he (137-45) intended to install for the defendant Cement Company; that he was acquainted with that type of plant. This referred to the proposed electrical plant to furnish power for the cement mill. He testified that he had to do with the operation and installation of such plants; that we (meaning plaintiff company), had five similar plants in operation on its system under his charge.

He explained that this type of electric plant operates automatically. That is, that the amount of load delivered at the end of the line, or at the motors in the cement mill, is automatically taken care of by the automatic feature of the electric plant, allow-

ing sufficient water to run through the turbines to pick up or drop the amount of load necessary to be delivered; that by the term 'load' he meant the amount of energy required to run the motors, lights and different electrical installations which are installed at the delivery end of the distribution lines.

That the amount of electricity required at the cement mill from moment to moment, or hour to hour, during the operation thereof, is determined by the numbers of motors and other appliances that are put in service, or taken out of service at any time of the day. That is the amount of power required at the cement mill is suddenly and greatly increased, this is supplied automatically; the electric plant would automatically pick up the amount of water required to generate the load—the energy for the load that is picked up. That in the operation of the cement mill the load would be changed by a man disconnecting or connecting his motor, or it could be changed by the different load conditions of the motor itself. That assuming that a certain amount of electricity is being used at the cement mill and more was suddenly turned on at the cement mill, the power would be drawn from the distribution line running to the cement mill. The amount of power plus (138-46) loss in transmission, and in the line added to it, would be the amount of power which the electric plant would have to pick up. *The sudden turning on of that power would automatically increase the quanttity of water necessary to pick up the additional load. He explained that there is a set of gates that are operated by a governor which is electrically controlled.* These gates open and close *on the turbine itself,* allowing the required amount of water to go through to generate the load as indicated by the delivery at the end of the distribution line. These gates are operated automatically; that if there is no load on the cement mill, there would be no water flowing through the electric plant. As the load is picked up at the electric plant, the amount

of water required to produce the load is drawn from the canal and through the canal up to the full capacity of the electric plant, if the load requires it. That when the cement mill draws no current at all, the water is automatically shut off at the electric plant wheel; that the effect which this has on the water in the canal and on the water in the forebay above the canal is that the water will seek its own level, and build up to the spillway level, above the spillway level until the quantity of water flowing in the river can discharge into the spillway, or be forced back into the channel of the river above the intake gate." (R. 188-191).

And further, as follows:

"That through the demands of the peak load upon the electric plant, the flow would—in such an automatic plant—increase to a point where it would take care of the load. That there is no automatic limit to the amount of water which would be drawn through the gates; that this depends upon the demand of load; that the load is the demand. That there is no automatic limit upon the amount of water drawn through the gates, except the demand of the load. That you cannot operate the plant automatically and still limit its capacity. That the plant cannot be so regulated that not more than a certain amount of water will be drawn from the stream through the plant under varying load conditions. That you might limit the maximum point or the maximum amount you could take from the plant, but below that maximum you would have no control (154-62) over it. But that you could so set it that the maximum would not be passed. So that it is a matter of operation by the company of this machinery. That you could set the machinery so that it should not so operate as to take more than a certain amount of water through it. But that you could not so set the machinery that a given head will be maintained at the gates with a given elevation so as not

automatically to draw the head down below a certain point. That you cannot set this machinery so automatically the water would not be drawn down below 1069. That it would depend upon the load that you are carrying. The water elevation would depend entirely upon the load you were carrying up to a limit, if you want to put a limit on it, but that that limit cannot be put at a point which will maintain that elevation at the headgates. It is an engineering impossibility." (R. 208-209).

Mr. Boyle further said:

"That in the *ordinary operation of the cement plant,* the *usual* thing to do would be to draw the water from plaintiff's property whenever the flow was less than 1340 second-feet; that naturally (146-54) if the power is required by the Cement Company's use, it would be economical and proper in the operation of the plant to draw all of the water—get all of the water available." (R. 199).

STAND-BY PLANTS AND THEIR USES EXPLAINED

Stand-by plants. The evidence shows that the petitioner requires its said property for the operation of a stand-by plant.

These and their uses are described as follows: J. C. Thompson, division manager of petitioner, and whose testimony begins at R. 160, stated in substance as follows:

"Explaining the meaning of the term 'stand-by plant' he said that such utilities, where their plants were removed from the center of distribution, usually maintain steam plants near the center of distribution, but that this plant would serve the same purpose that a steam plant would serve.

It would be located near the center of distribution there, 12 miles from Medford, and equidistant from Grants Pass, and enable the Company to give stand-by service at Medford and Grants Pass, and at the Cement Company's plant at its quarry and the Illinois Valley.

He explained that the plaintiff's closest plant of (129-37) any size was at Prospect, approximately forty miles from the site in controversy, and back in the mountains on the upper Rogue River; that there were also plants in California, the Copco plant on an air line being about one hundred fifty miles from the site in controversy; that the transmission line comes into Medford over mountainous territory over the Siskiyou mountains. That the line is located in a territory subject to heavy snowfall, and subject to interruptions by the falling of trees on the line, so that a stand-by plant, such as is described, is partly used for protection against interruption in the service. Besides that, this plant would generate quite a little bit of power, estimated in 1926 to be about 5500 horsepower."

"That in 1922 it put in a second unit at Copco Number 1 of 18,000 horsepower, cost roughly $600,000.00; in 1923 and 1924 it put in the east side Klamath Falls plant of 4,200 kilowatts, cost approximately $600,000.00; in 1925 it put in Copco Number 2 with 44,000 horsepower, at a cost of three million dollars. In 1926 and 1927 it finished the plant of 44,000 horsepower, estimated to cost three and one-half million dollars; that in July, 1926, defendant City offered for sale its hydroelectric plant and plaintiff sought to purchase it, and submitted an offer of $40,000.00 for the plant. The defendant Cement Company offered $22,600.00 with practically the same conditions, except that the plaintiff's (130-38) was for cash, and the Cement Company's for one hundred dollars a month. That the propositions were submitted to an election resulting favorably to the Ce-

ment Company." (R. 165-6-7). And by engineer Boyle as follows:

Engineer Boyle testified in substance:

"That such stand-by plants run continuously and are in continuous serve. They regulate the voltage in case of line interruption. That they are in continuous operation except to regulate voltage in case of line interruption. They serve an emergency and are operated continuously irrespective of emergencies." (R. 203).

"The witness stated that the plaintiff had seven plants that were operating as stand-by plants, as a part of its property, and they are connected with five sawmill plants at the present time for stand-by service. That the five sawmill plants are not the only steam plants which plaintiff has as stand-by plants, but the plaintiff is operating one steam stand-by plant which is at Coos Bay.

He stated that the fundamental purpose of a stand-by plant is to pick up the distribution load of a community in which it is located and to regulate the voltage in which it is located for proper service to a customer. That the (148-56) plaintiff requires the property in question for this purpose, and this is the purpose for which the plaintiff acquired its property involved herein. That such property is useful for carrying out the plaintiff's business in the community in which the property is situated." (R. 201-2).

"One at Gold Hill (Gold Ray), two in the city limits of Klamath Falls, one at Keno, just a short distance from Klamath Falls, one at Shasta River, close to the town of Yreka, one at Winchester, close to the town of Roseburg, and one at North Bend on Coos Bay." (R. 202).

RESPONDENT CITY'S UNDISPUTED WATER RIGHT. THE WATER FOR THESE RIGHTS FLOWS NATURALLY INTO THE CITY'S PRESENT PLANT, AND THE CEMENT COMPANY'S CONTEMPLATED PLANT, WITHOUT REMOVAL OF ANY OF THE ROCK FROM THE SHATTERED AREA.

It has a water right adjudicated to it in the adjuication proceedings of 220 second-feet on its west side of the river. It acquired an additional 75 second-feet, known as the McClure Right, on the East side of the river. The decree of adjudication required that water to be returned to the stream *above* the petitioner's lands.

Petitioner, though not bound by the decree of adjudication, did not dispute these rights nor question them.

The cement company seeks, in this proceeding, to use the McClure 75 second-feet, by drawing the same through the shattered area, after the removal of the shattered rock, and the deepening and widening of the channel made thereby, and put the same through its proposed power plant. It is undisputed that this quantity of water, 220 second-feet, plus the additional 75 second-feet from the petitioner's side of the river, will naturally flow into the cement company's contemplated power plant, just as it now will flow into the small municipal plant purchased by the cement company.

We set forth from the record, the testimony of Boyle upon this subject:

> "The witness' attention was called to the City's claim to 220 second-feet, adjudicated to it, plus the 75 second-feet adjudicated as the McClure right; which latter right is on the plaintiff's side of the river.
>
> The witness was asked that if, assuming that the defendant City desired to use the total of these two rights, to-wit: 295 second-feet at the defendants' proposed plant, whether or not this quantity of water could be taken into the plant, without the removal of any of the shattered area; that is, whether water flowing in a state of nature would find its way down into the head of the defendant's canal. (144-52).
>
> The witness answered: Yes, that even with extreme low water in the river, the defendants could still get the said amount of 295 second-feet without making the excavation of the shattered area, that is, the removal of the rock shattered by the explosion." (R. 196-7).

Upon this subject Mr. Muirhead, in the trial of a former case between the same parties, No. 5806, reported in 35 Fed. 2nd, 317 (1929) testified upon that subject. The former case is referred to herein at R. 414 (73 Fed. 2d, 558). That testimony was introduced into this case, and we quote it:

> "A power plant runs all the year around, runs (153) all summer, really runs steadier in the summer than in the winter; therefore it is necessary to provide for continuous operation during July, August and September when the river is at the lowest, and all the water of the river is needed during these months. He testified:

Q. Could you get along with 220 second-feet?

A. Could we?

Q. Yes? A. No, we could not.

Q. Wouldn't be of any benefit to you at all, would it?

A. 220 second-feet would be of some benefit to us.

Q. You would not put in this installation if you could only get 220 second-feet, would you?

A. No, I don't think we would, although we have contemplated starting this little generator that is up there temporarily and running it on this; but we have never done it.

Q. But you could easily get 220 second-feet without going clear across the river for it, couldn't you?

A. Yes.

Q. Wouldn't have to cross the thread at all and go to any expensive work at all to get 220 second-feet, would you?

A. No, I don't think we would.' (154)." (R. in Number 5806, pages 219, 220).

THE CEMENT COMPANY WOULD TAKE THIS POWER AWAY FROM PETITIONER AND SELL WHAT IT DID NOT USE.

The cement company seeks to deprive petitioner of the use of the water in question by making electric power therefrom to operate its cement mill, and to sell the surplus in the market. This would be in competition with the petitioner. The cement company is not empowered to act as a utility.

We quote from the record showing the testimony of Mr. Muirhead given on cross-examination as a witness for his corporation:

"Asked if their electrical plant was to be built only for the manufacture of cement, he answered: That it was built primarily for the manufacture of cement, but that the company had a contract with defendant city to supply it with twenty kilowatts free, and any additional that it might want at one cent per kilowatt; that the company had opportunity in addition to that, unless stopped by the utility, of selling to any other customer that might be developed in that territory. And they would do that should the customer present himself.

When his attention was called to the fact that the pleadings show 'not a public service', he answered: Wasn't that the question you asked, depends entirely on the service? He stated that the Cement Company could operate the plant solely for cement use, but naturally if it had an investment there, it would want to make the best use of it it could, and should business be such some year that they could sell only fifty per cent of their usual amount of cement sales, and the mill would be down proportionately lower, and they could find an outlet for their power, they would certainly sell it." (R. 334).

Asked as to the amount of power which the cement company would be required to furnish the city under their contract of purchase, he testified: "About twenty kilowatts."

This is his testimony:

Mr. Muirhead, for the Cement Company, testified as to the City's requirements, as follows:

"Asked as to the amount of power the Cement Company was required to supply to the City of Gold Hill at one cent per kilowatt hour, he stated: That it was supposed to give 20 kilowatts free and obligated to give any additional they want over that amount without limitation up to the com-

pany's capacity of one cent per kilowat hour." (R. 113-114).

Mr. J. C. Thompson, petitioner's division manager, testified that the requirements of the city were only 170 horsepower.

We quote from the Record:

> "The witness testified that the amount of power consumed by the City of Gold Hill is less than 170 horsepower within the city limits. This is the maximum demand. He testified that a kilowatt is three-quarters of a horsepower. (131-39)." (R. 168).

On the amount of power that could be made with the 220 second feet, plus the McClure 75 second feet, to wit: 295 second feet, at the effective head which the testimony showed to be available at the point of use, Mr. Boyle testified:

Mr. Boyle:

> "He stated that the 220 second-feet, at a surface water elevation of 69, and an effective head at the power-house of 23 feet, would give 350 kilowatts. He stated that assuming the same conditions in the use of the 220 second-feet as were assumed in the use of the full 295 second-feet, with a surface elevation of 69, and an effective head of 23 feet, 350 kilowatts would be produced at the proposed plant. (Tr. 132.)" (R. 201).

CEMENT COMPANY WOULD MAKE A FISHWAY OF PETITIONER'S LANDS

Mr. Muirhead, for the cement company, was asked how much water would be left in the river if he removed the shattered area, changed his canal as con-

templated, and operated the kind of a cement mill described in his testimony. He testified, in effect, that he would have to leave 122 second-feet for a *fish-way*. We quote his testimony:

> "Asked how much water he contemplated would be left on plaintiff's Lots 1 and 2 when the Cement Company's (97-8) plant should be in operation, he stated that he believed that at the very minimum there would be 122 second-feet flowing down the east side of the river on said lots, and witness then added: 'And which we will have to permit to run there as a fishway. I believe there is a law passed that requires that.' (Tr. 14).
>
> Plaintiff's counsel, having stated that he knew of no law requiring a fishway on plaintiff's land, the witness answered:
>
> 'Well, it has to be down the river at least, and of course it couldn't get down to the canal through our turbines, so we will leave that originally'." (R. 114).